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CLEMENCY IN PENNSYLVANIA



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NATIONAL COUNCIL ON CRIME AND DELINQUENCY

1973

DECEMBER 1973

COMMONWEALTH OF PENNSYLVANIA



Board of Pardons

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CLEMENCY IN PENNSYLVANIA

*Historical perspective of
the clemency function.*

Review of case law.

*Present practice in
the Commonwealth of
Pennsylvania.*

*Recommendations
for change.*

1973

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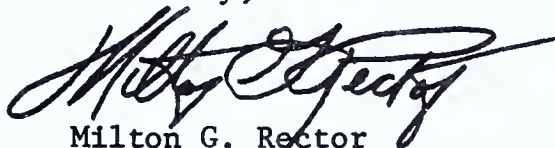
Dear Governor Kline:

The Survey and Planning Center of the National Council on Crime and Delinquency is pleased to submit the final report on Clemency in Pennsylvania.

This extremely important, but often neglected area of the criminal justice system, has been long overdue for an indepth examination -- not only in Pennsylvania but nationwide. We are indebted to you and the other Board members for your cooperation and absolute frankness in permitting us to have access to confidential material in conducting this survey. The friendly cooperation of Mr. Gerald Gillingham and his staff is also very much appreciated.

NCCD sincerely believes that the recommendations offered will result in an improved clemency function and that the entire criminal justice system will profit if new sentencing legislation is implemented. We look forward to being of further service to the citizens of Pennsylvania.

Sincerely,


Milton G. Rector
President

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INTRODUCTION

INTRODUCTION

INTRODUCTION

Of all the procedures now in use for releasing a prisoner, the pardon may be considered the patriarch. Not only is it the oldest of them, but many of them are its direct descendants. Its origins extend back to the earliest beginnings of human history when the fathers of families or of clans exercised the power to forgive as part of their power to punish. From these heads of families the power passed naturally to tribal chiefs and ultimately to priests, princes, warlords, judges, kings, legislatures, presidents, governors and citizens meeting in public assembly. Its use in one form or another became a human institution. Assumed by absolute rulers as a matter of course, it has at various times and places been vested in such diverse individuals and groups and exercised under such a wide range of circumstances that any comprehensive survey of its use would, doubtless, display the full range of possible variations in human culture and government.

The pardoning power enjoys -- and suffers -- a unique position in American jurisprudence. It is a part of the legal system, yet in most ways is above it. It is generally considered to be the safety valve in our system of justice -- the mechanism by which those unavoidably victimized under the rule of law may find vindication. It is the legal exception to that rule. It represents the last vestige of almost unrestricted power in our form of government and our tacit admission of the inevitable imperfections of democratic rule.

In the days when law-giving was a less formalized procedure and, therefore, a far more rare occurrence than it is today, the pardon was the key to reform.

As laws creating crimes or punishments became recognized as less just than they had once seemed, rulers would at first exercise the pardoning power. Only when granting a pardon had become a matter of course would a change in the law be contemplated.

The pardon has also been an instrument of reform in another important way. It is the source of such modern rehabilitation-orientation release procedures as parole, furlough, work release and good time laws. As a virtually unrestricted power, the pardon remains capable of performing not only those functions which remain exclusively its own but also those of its offspring. Despite occasional attempts by the higher courts to define parole and conditional pardons or commutations as exclusive of each other, there is, in fact, nothing to prevent a governor or pardon board from granting a conditional pardon identical to parole.

The danger lies in confusing capability with desirability. Since the pardoning power is recognized as a "safety valve" in the legal system, it has a natural tendency to absorb those functions being left unperformed by other, often more appropriate agencies. In particular, legislatures often make excessive use of the pardoning power inevitable through such limitations on parole administration as the imposition of minimum terms of parole eligibility on offenders. A number of states have attempted to resolve this difficulty by making their pardon and parole boards one and the same. This expedient, however, only further confuses the issue when the broad power to pardon is being used not simply as a safety valve, but to cover basic deficiencies in laws governing sentencing, probation and parole and the rehabilitation of offenders generally.

In this study we will attempt to define rationally the limits to which the pardoning authorities should restrict their activities in order to optimize their positive influence on the criminal justice system. The study is divided into four chapters. Chapter One, "The Historical Background of Clemency", traces the development of the pardoning power from its earliest beginnings in ancient cultures to the constitutional provisions and administrative codes governing its exercise in Pennsylvania today. Chapter Two, "The Law of Pardons in Pennsylvania", is a review of relevant case law defining the nature and extent of the pardoning power in the Commonwealth. Chapter Three, "Pardoning Procedures and Practices in Pennsylvania", discusses administrative policies, working procedures and decision-making processes of the Board of Pardons and its staff. Chapter Four, "Analysis and Recommendations", examines the findings of NCCD staff employed on the study and lists recommendations for long-term and procedural changes ranging from constitutional revision to administrative reforms. Finally, the study includes a series of supportive appendices comprised of the *Model Sentencing Act* drafted by the NCCD Council of Judges and the collated results of statistical and other related research.

With the exception of the Attorney General's *Survey of Release Procedures*, Volume III, "Pardon" (Government Printing Office, 1939) and Smithers and Thorn's *Treatise on Executive Clemency in Pennsylvania* (Philadelphia, 1909), surprisingly few management studies have been conducted in this important area. It is our hope that this study of the Pennsylvania Board of Pardons will assist not only the Commonwealth of Pennsylvania, but that the standards it presents will be of value to other states as well in re-examining their systems for the exercise of the pardoning power.

1. THE HISTORICAL BACKGROUND OF CLEMENCY

I. THE HISTORICAL BACKGROUND OF CLEMENCY

Clemency in the Ancient World

The modern English word "clemency" comes to us from the Latin words for mildness (*clementia*) and merciful (*clemens*).¹ The origins of the principle it describes, however, are not so easy to trace. The idea that justice should be tempered with mercy is among the oldest of human ideals; its inventors were the earliest men. They were men whose highest aspiration was survival -- such men as those of whom Homer wrote:

Meetings, that counsel bring, to them are not,
Nor legal judges. On the high hill tops
They dwell, or in the hollow cave; and each
To wife and children gives the law.²

Ultimately, these individual families became tribes in which each patriarch was similarly a law unto himself. Violations of that law, of course, constituted not only a challenge to the law, but a personal insult to the chieftain and a challenge to his authority and the order he had imposed. It seems unlikely under such conditions that mitigation of punishment was a very common occurrence. Mercy would have to be begged, or the gods called upon to declare their will in the matter through such institutions as the trial by combat or, among the Germanic tribes, the ordeal.

The early civilizations were, without exception, theocracies under which clemency and the ideal of mercy were inevitably associated with divine grace. Courts were usually held in the temples, often including priests and idols as

part of the presiding tribunal. The Pharaohs of Egypt ruled as the gods' representatives on earth, defining the laws and dispensing both justice and mercy.³ In Babylon, the king similarly served as vice-regent of the gods in representing the exceptional power above the law. The Syrians had a particular god of mercy before whose image captives were released.⁴ And in the Hebrew tabernacle, God's mercy was symbolized by the Propitiatory or "mercy seat" (the seat of God), which covered the ark in which the Commandments were kept.⁵

The common method for settling disputes between tribes or families in the ancient world was the blood feud. The killing of a kinsman resulted in his family seeking vengeance -- often not only against the slayer, but against that man's heirs as well, with the inevitable result that occasionally whole tribes were wiped out or their remnants driven into exile. Hebraic law attempted to curb this practice by granting the right of blood revenge only to the victim's closest relative and adding the admonition: "The fathers shall not be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death for his own sin."⁶

With the rise of strong rulers, the practice was further limited by the power of the king's protection and it is in this connection that some of the earliest recorded instances of the exercise of the pardoning power can be found. In II Samuel 14, David is called upon to extend his mercy to the son of a widow. The son having slain his brother in a quarrel, their relatives demand the customary blood revenge. The widow pleads that if the punishment is carried out, she will be left childless and her late husband without an heir to carry on his name. David agrees that her son should be spared and pardons him. It is

important to note that even though the taking of blood revenge by any but the next of kin had already been outlawed, only the power of the king could prevent the killing from spreading successively until the conflict involved entire tribes.⁷

In an effort to further restrict blood revenge to cases of willful homicide, Mosaic law created the strange -- but in retrospect highly sophisticated -- institution known as the Six Cities of Refuge. Anyone who killed involuntarily could flee to one of these cities where, after a trial in the temple court, he could live under the protection of the High Priest. Upon the death of the High Priest, those under his protection were granted amnesty and could return home. Thus, a conditional protection almost akin to probation for the indefinite term of the High Priest's life became a pardon on the occasion of his death.⁸

As we have observed, the laws of the early civilizations were intimately inter-related with the will of the gods and were considered divinely inspired -- if not always, as with the Hebrews, delivered by God in person. Although we find a number of recorded instances of the exercise of the pardoning power for political and economic reasons, and especially as a part of royal efforts to curb the blood feud, the ancient theocracies were, by their nature, unable to define the pardon as an instrument of rational policy. God -- or several gods -- ruled supreme over men and handed down their laws from above. A criminal act was not an offense against society or the authority of the king, but against God and, in the strictest sense, only God could pardon him. It is not unusual, therefore, that as a concomitant to the stunted development of the pardoning power we see the introduction of unusual legal mechanisms such as the Cities of

Refuge or the practice of having the principal witness in a capital case cast the first stone at the condemned man and so commit murder if his testimony had been false.

Among the Greeks, most criminal cases were settled through civil suits resulting in private restitution. This system was apparently not unlike the *wergild* concept later used by the Anglo-Saxons, and probably evolved in the same way -- as the result of much bloodshed between the clans of early Athens. A pardon could only be extended in cases where the penalty attached to a public wrong.⁹

When the Greek democracy was not undergoing one of its occasional subjections to despotic rule, the people were recognized as the sovereign power of the state. Since laws were not statutory but constitutional, and since the equilibrium of the democracy was invariably precarious, there was tremendous resistance on all fronts to circumventing criminal penalties in any way. Acts of general amnesty were commonly used to reconcile disparate factions at times when the need for national unity was paramount -- as in the famous amnesty of Salon, and also during the Persian wars, at the end of the Peloponnesian War, and after the Battle of Chaeroneia which completed the conquest of Athens by Philip of Macedon. The path to the individual pardon, however, was a tortuous one; a petition had to wend its way through the complex Athenian system of checks and balances, cross-checks and counter-balances, ultimately requiring the unanimous approbation of the six-thousand-man assembly.¹⁰ Nevertheless, in *The Republic*, Plato, a strong advocate of the firm rule of law, has Socrates remark ironically: "In a democracy you must have seen how men condemned to

death or exile stay on or go about in public and no one takes any more notice than he would of a spirit that walked invisible."¹¹ Although the context of the passage is unclear, it would seem to indicate that the mitigation of punishment was not so rare as the absence of an established pardoning procedure, of a sovereign or executive in whom the power might have been vested -- and, in fact, of even a word for the individual pardon in the Greek language -- would otherwise cause us to conclude. We do know that a number of prominent and popular Athenians had sentences of exile and even death revoked and that in the case of Demosthenes the people circumvented the unconstitutionality of remitting fines by awarding the orator an amount equal to the fine imposed on him.¹² We also know that an altar of mercy was retained at Athens long after Draco had codified the laws and law-making had become a political, rather than theocratic, function.¹³

The most significant contribution of Roman law to the development of pardons was the diffusion of the power into both the judicial and legislative realms. Under the Republic, the power was vested in each court both to prescribe and remit punishment, either at once or after some time had been served. Pardons by the Senate did not appear until much later, but by the time of the emperors the Senate could pardon either after sentence had been given or before trial was held -- though in practice such actions were taken only according to the will of the Emperor.¹⁴ The power seems also to have been extended to the Emperor's governors in the conquered territories, particularly when local customs called for its exercise on such occasions as religious feast days. The obvious example of this practice is Pontius Pilate's offer to release Jesus of Nazareth on the eve of the Passover.¹⁵

As can be seen from the broad clemency powers vested in courts and juries, Roman law did not consider the pardon distinct from other aspects of the legal process. It was possible, for example, for a jury simultaneously to condemn an act as criminal, find the defendant guilty, and yet pardon him all the same.¹⁶ Further, the nature of capital penalties -- which could include not only death, but death by slow torture, deprivation of an honorable burial, and invalidation of the condemned man's will -- permitted a kind of partial pardon unknown to us today. Thus, a man could be "pardoned" to the extent of being allowed to commit honorable suicide, an action which also caused his estate to be remitted to his heirs. Finally, the more primitive and superstitious aspects of clemency under the Romans may be seen in the fact that if a doomed man accidentally encountered a vestal virgin on his way to the place of execution, he was automatically pardoned.¹⁷

Both the Greeks and the Romans formally advocated the rule of law as the substitute for the ancient right of retaliation and the latter, at least, eventually recognized compassion as a rational instrument of state policy and considered the pardoning power, wherever vested, as a fundamental adjunct to the proper administration of justice. Most of what is known about Attila the Hun comes from records made by the Romans in the last years of the Empire. His hordes ranged as far to the west as the Atlantic coast of Gaul and as far north as Scandinavia, encroaching upon the territory of the Anglo-Saxon tribes who subsequently (and, according to some authorities, consequently) invaded Britain and stayed on as settlers.¹⁸ Attila ruled as an absolute despot, regarding all subjugated peoples as his slaves and asserting an absolute right to dispose of their lives and property as he saw fit. All attempts to escape his sovereignty

he punished with terrible cruelty, and his demands on the Romans for the return of fugitives -- often in lieu of tribute -- are well documented. Although it is said that he was a shrewd diplomat who respected the law of nations and who could be just and magnanimous toward his enemies, there is no indication that mercy played any part in his domestic administration and the expansion of his empire is not commonly thought of as the advance of a civilization, but rather as the encroachment of barbarism on the civilized world. In any case, his empire collapsed immediately after his death in 453, leaving behind no laws or traditions, but only a memory of terror and a shattered Rome.¹⁹

With the collapse of the Roman Empire, the predominant law in Europe became German tribal law. In its most primitive state, this took the form of a trial before a public assembly of the whole tribe and was limited to only two forms of punishment: the death penalty and banishment. Thus, the people sentenced and pardoned. Although, since those criminals likely to suffer it were permitted to flee, the death penalty was restricted to a very few cases, its forms were many. The manner of the criminal's death was determined by what punishment the tribesmen felt would best mollify the particular god he had offended. By ordeal, the gods were asked whether they wanted the victim or not. If the gods refused the gift, the criminal was automatically pardoned. Other very ancient punishments, such as exposure in a leaky ship or a ship without a rudder, were similar inquiries to the deity whether it would accept the offender or not.²⁰

The Development in Medieval Europe

With the reunification of Europe under the Franconian kings in the eighth and ninth centuries, the dispensing of justice and mercy again became the prerogative of a royal sovereign. In earlier years, fidelity to the tribe and to its chosen leader were self-evident rules of survival. With the rise of a unified German state and the subsequent displacement of the Teutonic tribal structure with a hierarchy of nobles headed by the king, however, such priorities were no longer so obvious. The king was far away and the concept of national policy was often too complex to be understood by the isolated village peasant. Therefore, oaths of allegiance were instituted and an appropriate ideology introduced. The king's vassals swore allegiance to his rule and at the same time accepted responsibility for the acts of their own vassals who, in turn, swore fealty to them. Thus, if a man committed a crime, he was held to have broken the intimate and oath-confirmed tie of fidelity between himself and his ruler.²¹

This arrangement was, of course, simply the old patriarchal model on a grand scale. Crimes were not violations of written rules or regulations but personal matters: individual rebellions against the will of the king. This system also naturally implied the concept of the king as the sole pardoning authority and seat of mercy. There were no unpardonably heinous crimes, as in later years, because offenses did not involve questions of morality but simply the king's right to be respected and obeyed.

Under Charlemagne, whose empire encompassed most of western and central Europe, this principle achieved its fullest flowering. After his death, however, his

successors proved unable to keep the empire intact -- or to control the nobles, prevent local warfare and suppress piracy and highway robbery. Most important, they were unable to protect their subjects from the latest spate of barbarian raids and invasions.²² With the subsequent rise of feudalism, the power of the kings became, for all practical purposes, limited to their own estates, and the pardoning power devolved to princes and other powerful nobles, ruling archbishops, the oligarchies which governed free cities and, in general, anyone who maintained the rule of law in a region. These times also saw a resurgence of the traditional blood feud. Ultimately, actual blood revenge was displaced by acts of expiation and compensation in return for the private pardon of the slain man's next of kin.²³

Medieval Europe's chaotic political development gave rise to a number of unusual, and in some cases unique, forms of pardon. Some clearly evolved from the custom of the ordeal and its attendant principle of divine intervention in criminal proceedings. Thus, an offender was pardoned if his execution failed or if he failed to confess under torture; God, it was believed, would let no innocent man be induced by bodily pain to admit a crime.²⁴ By the thirteenth century, it had become customary for the executioner to be entitled to pardon every tenth man and in medieval towns which did not have a professional hangman, a doomed man was sometimes pardoned on the condition that he execute his companions. The Roman custom of the pardoning power of vestal virgins also appears to have carried over into Germany (although it may have developed there quite independently); a condemned man could be spared by the request of a pure virgin to marry him.²⁵ Sometimes the pardon was instantaneous and resulted in the banishment of both marriage partners; at others the

execution was postponed and the prince was petitioned for pardon. Also recognized was the right of leading citizens in a community to intercede on behalf of the criminal, although this practice was frequently outlawed in the larger commercial towns.²⁶

Such events as the birth of an heir to the throne, the beginning of a reign or the succession of a bishop were often occasions for pardons or general amnesty.²⁷ These, of course, were by special proclamation, but there were many automatic forms of pardon as well. Banished people were permitted to return to their town or country if they clung to the vehicle of the entering prince, and in medieval towns throughout Europe exiled citizens were allowed to return if they held fast some part of the horse of the newly elected bishop.²⁸ Queens, princesses and women of high position generally could pardon by taking the criminal under their mantle.²⁹ The abbesses of the convents of Lindau and Zurich had from very ancient times the right to grant pardon by cutting the rope by which the doomed man was led to the place of execution -- a power which was also granted to the magical personage of mothers who had had seven consecutive sons and sometimes to the seventh son himself.³⁰ The story of Lady Godiva derives from the possibly apocryphal custom, cited by Grimm, that a girl or woman could secure a pardon for a condemned man by running naked through the town, nine times naked around the market place or three times naked around the prison where the criminal awaited his execution.³¹

These customs grew out of the ignorance and superstition of the Middle Ages, and were aided by the fact that the pardoning authority was vested in, and subject to, the personal caprice of a relatively large number of individuals.

Most of them seem to have disappeared simultaneously with the rise of national states from the fourteenth to the seventeenth centuries. As the Crusades and feudal wars decimated the nobility, the king and his central government gradually regained their lost power. By this time, the right of pardon had become a rich source of income which the kings were eager to wrest from the minor princes and their courts in order to exploit it themselves.³²

During its ascendancy, the French kingdom had to fight two lucrative forms of remitting penalties. The first was the right of sanctuary held by the clergy, and the second was the feudal system under which each feudal lord possessed the right of jurisdiction and the right to pardon. The regulations of Louis XII (1506) and of Francis I (1539) restricted the powers of the clergy in this respect.³³ The powerful feudal lords were slower to surrender their right to pardon, but by the reign of Louis XIV the power was sufficiently concentrated in the king to permit the most outrageous abuses by his counselors and favorite members of his court.³⁴ Germany experienced a later, though parallel, development until by the eighteenth century abuses were such that Kant argued against any kind of pardon except in crimes directly against the person of the king. Kant's polemic charged that the king, in pardoning for crimes not directed against him personally, was interfering with the legitimate and natural rights of his subjects, specifically those individuals primarily injured by the criminal act (a somewhat ironic assertion when we recall the close relationship between the development of the royal pardoning power and attempts to prevent victims and their families from exacting blood revenge).³⁵

Social philosophers throughout Europe began to criticize the principles of absolute monarchy and the excesses of royal use of the pardoning power. In

Italy, Beccaria argued that just laws, properly administered, would not need such corrective agents.³⁶ His views were especially praised in France, and after the French Revolution in 1789, the right of pardon was abolished. The experiment lasted only seven years, however, and since that time the pardoning power of the executive in France has not been contested.³⁷

The Pardoning Power in England

The invasion of Gaul and Italy by the Goths in the beginning of the Fifth Century, coupled with the turmoil caused by the ravages of Attila, had left Britain effectively cut off from Rome. The Romano-British culture (and, of course, law) that remained was largely confined to towns and villas in the lowlands of the Southeast. It was these areas that were the first to be conquered by the invading Germanic tribes. As the Anglo-Saxons advanced, the civilized Celts and Romans withdrew to the hill country which, while more easily defended, deprived them of the climate required for the survival of their culture; within a generation it withered and died. Thus, the Anglo-Saxons who came to rule Britain remained untouched by Roman law or Roman learning, and their laws continued to develop according to the pattern common to the Germanic tribes on the Continent.³⁸

These laws included the time-honored right of blood revenge common to most primitive tribal structures, with occasional recourse to the will of the gods as expressed through the ordeal.³⁹ The power of the kings who nominally ruled over the various tribes was tempered by the general recognition of the right of private vengeance among the warrior people and by the power of the great earls, which was often nearly as great as that of the king. It therefore

seems unlikely that royal clemency -- or indeed clemency of any kind -- was much practiced before the introduction of Christianity at the end of the Sixth Century.

In 596, however, the militant Pope Gregory sent a mission led by the monk Augustine to convert the Anglo-Saxons to Christianity. Augustine was received by Ethelbert, King of Kent, whose wife, the daughter of the King of the Franks, was already a Christian. Within a few years, the missionaries had converted not only the king but many of his subjects as well, and in less than a hundred years all of England had become Christian.⁴⁰

The introduction of Christianity lent an immediate moral force to the law-making power of the king. Not long after his conversion, Ethelbert issued the first written English laws, asserting the king's *mundbyrd*, or "right of giving protection" and clearly attempting to hybridize the moral obligations of the new religion with the traditions of a Germanic legal system.⁴¹ Still, the power was ill-defined -- as was, in fact, the distinction between public and private wrongs, now further confounded by the concept of sin -- and no records survive of a pardon actually being granted or even contemplated.

Wessex, the second kingdom to undergo conversion to Christianity, enjoyed a succession of strong rulers who greatly expanded its territory and influence. Under Alfred the Great (c. 871-899) the boundaries of the kingdom nearly encompassed those of Roman Britain. Also known as "the Lawgiver", Alfred studied

the Bible and the laws of his predecessors before issuing his own Dooms, a tract which specified penalties or compensation for virtually every offense then known, from hair-pulling to homicide to the failure to fulfill a pledge. Paraphrasing and elaborating on Exodus 23:3, he wrote: "Judge thou very fairly. Do not judge one judgment for the rich and another for the poor; nor one for one more dear and another for one more hateful."⁴²

At the core of Anglo-Saxon law was the principle of compensation. Men were ranked less by honorific titles than according to their *wergilds*: the value placed on their oaths in lawsuits and the amount of compensation that would have to be paid if they were killed.⁴³ A man accused of a crime would be summoned before a public assembly ("The Hundred") where he would be called upon either to confess his guilt or swear to his innocence. If he confessed or were found guilty, he was required to pay whatever proportion of his *wergild* was required by law for that particular crime or go to the ordeal. If found guilty by the ordeal, he still was permitted to pay the appropriate compensation; if unable to pay, the convict went into penal slavery to the one he owed.⁴⁴ The story of the growth of Anglo-Saxon law is told by the increasingly harsh penalties imposed by their kings on families who took their vengeance in blood before first seeking satisfaction before The Hundred and the king's reeve under the law of compensation.

The king's right of protection was fully established by the time of Alfred the Great. It was primarily extended to the king's own house, to places he was visiting, to churches and to religious festivals and other public gatherings

under the king's aegis. The man who violated the king's *mund* by fighting or drawing a weapon forfeited all his possessions and it was left to the king to decide whether or not the offender would live.⁴⁶ These offenses were known as *botleas* crimes or "crimes beyond compensation", and it was their existence that was to make the recognition of the king's power to pardon not only possible but necessary. About the middle of the tenth century, King Edmund made it inevitable by outlawing the blood feud and making an attack on a homestead a crime beyond compensation, thus extending the king's protection, in theory, at least, to every subject in the realm.⁴⁷

In 1014, King Ethelred declared the king's power to pardon offenders who reached religious sanctuaries (homicide in a church had by that time become a crime beyond compensation).⁴⁸ The power was further defined and specified by Cnut in the laws issued after his pilgrimage to Rome.⁴⁹ Finally, in the collection of laws and customs made by Edward the Confessor on the eve of the Norman conquest, the following appeared: "However, if anyone having done wrong, being in peril of life or limb for his evil deed, has sought the king's pity, the king can pardon him, if he chooses, by the power of his dignity."⁵⁰

Most Anglo-Saxon kings ruled with the advice and consent of -- and sometimes at the pleasure of -- the *Witan*, a council of powerful nobles and clergymen. William the Conqueror retained the council of Edward the Confessor, adding to it Norman nobles from his own circle of retainers. But to him the question of the absolute sovereignty of the king in all matters was not a debatable point; he intended to rule, as had the great Franconian kings, as Lord Parliament, with power to make laws or suspend their operation according to his will.

William's primary intention in establishing his English kingdom, according to Jenks, was "to be a rich king instead of a poor duke".⁵¹ He wanted a political and judicial system which guaranteed him, as far as possible, against rebellion and the loss of all his wealth. He introduced a feudal system styled after those on the Continent under which "every man, noble and simple alike, should hold his land as a pledge of good behavior"⁵² yet, at the same time, he contrived to retain the powers previously held by the Anglo-Saxon kings, including the power to pardon. It is recorded that, while in large measure he retained the laws under which England had previously been governed, his new subjects were both amazed and impressed by the efficiency with which the laws were now administered. The Domesday Book, compiled under his administration, contained a complete survey of England's landed property and other wealth which William used for levying and collecting taxes.⁵³

To William, as to the French rulers from whom he had acquired his conception of sovereignty, the royal power to grant clemency was both exclusive to the king and delegable by him, to be exercised as he or the bearer of his franchise saw fit. He granted powers of clemency to some of his own followers along with landed estates, and also to the more powerful Saxon earls who had exercised them under previous kings. These grants included not only the power to pardon but virtually every judicial authority assumed by the crown.⁵⁴ At the same time, he rendered his authority unquestionable in the same way the Franconian kings had: by compelling all feudal lords, from the greatest earls to the lowest knights, to make their oaths of allegiance directly to him. Previously, English kings had received such direct pledges only from their top vassals.⁵⁵

William's successors likewise strengthened the central government. The powers of the borough courts to hear cases, and of the king's reeves in the various shires to enforce the law, gradually encroached upon the feudal courts convened by the nobles.⁵⁶ During the reign of Henry II (1156-1189), the king's peace was extended. Under the provisions laid down by the Assize of Clarendon (1166) and supported by the Assize of Northampton (1176), judicial procedure became more regular and it was made possible for those who had committed a heinous crime to remain at liberty within the realm for forty days in order to promote sustenance for themselves while in exile, after which they must abjure the realm or suffer the consequences.⁵⁷ Also under Henry's reign, the great lawyer Glanville compiled the first book of the English Common Law.⁵⁸

During the next two reigns, both administered by John (first as regent for his Crusading brother Richard, then as king in his own right), the keeping of judicial records was begun and reference to previous decisions became an active part of the legal process.⁵⁹ The Curia Regis, a central court composed of the most important men in the nation, no longer confined its attention to great men and great causes, but became a tribunal staffed by the ablest lawyers of the day where all classes of cases were tried.⁶⁰

Having become the most nearly absolute ruler in the history of England, John proceeded to challenge the Pope's right of investiture and was subsequently excommunicated and ordered deposed by Innocent III. The nobles rebelled, and in 1215 John was forced to sign the Magna Charta to regain their support. This document limited royal power, stating that the king could not imprison

any freeman except by judgment of his peers and in accordance with the laws and could not levy taxes without the consent of the Great Council, a body consisting of the nobility and the higher clergy which was later to evolve into Parliament.⁶¹

During the next reign, that of Henry III (1216-1272), Bracton, the churchman and lawyer, compiled his notebook of decided cases and initiated the codification of English law along the lines laid down by Justinian. Writing of the king's exercise of the pardoning power, he formulated a principle which has been recognized almost continuously ever since: "The king cannot grant a pardon with injury or damage to others. He may give what is his own -- that is, his protection, which the outlawed person has lost through his flight and his contumacy -- but that which is another's he cannot give by his own grace."⁶²

Henry's successor, Edward I, in an attempt to undermine the power of the church and the nobles, expanded the Great Council's membership to include middleclass representatives. His purpose was to insure the loyalty of the wealthy bourgeoisie, not to further democracy. But the result was a bicameral legislature which, by threatening to withhold tax laws, was eventually able to compel the English kings to accept its legislation not only on taxes, but on all matters. By the fourteenth century, all laws required the consent of both houses of Parliament and the approval of the king.⁶³ Several times during the reign of Edward III, attempts were made to limit further or regulate the royal powers, particularly that of crown clemency. In 1328, he

submitted to a parliamentary statute declaring that charters of pardon were "too easily granted" and limiting them to "where a man slayeth another in his own defense or by misfortune".⁶⁴ Edward approved the law but ignored it, and two years later was rebuked for his defiance in a statute which charged that the previous act "be kept and maintained in all points".⁶⁵ The following year, even while attempting to constrain the king's pardoning power, Parliament recognized the principle that "it is to be understood that all such charters be of the grace of the king as before they have been".⁶⁶

It was common practice at this time for the king to sell pardons or to grant them at the behest of the church or other influential people. In addition to these abuses of the power by the king, all kinds of pardon frauds by the petitioners seem to have been frequent. In one case, the brother of a man indicted and jailed for murder joined the army, fought in battle, and subsequently appealed for clemency, all under the condemned man's name. Forgery of royal letters of pardon was another common occurrence, as was the claiming of benefit of clergy, which had been extended in 1351 to include all those who could read, irrespective of clerical affiliation. The test of literacy was the ability to recite in Latin a well-known verse of Scripture.⁶⁷

Richard II (1377-1399) abused the pardoning power in another way. He made his pardons revocable and not only charged large sums for the initial grant but continued to extort money, especially from condemned felons, for years afterward.⁶⁸ He further abused the practice of granting general pardons during times of war or internal strife by subsequently reneging on his promises once

the crisis was past. Trevelyan records that during Wat Tyler's Rebellion (1381): "The King was in the tower, which his subjects proceeded to blockade. The situation was saved -- but by very base means. Richard II was sent to a conference at Mile End with the rebels where he made them a promise of pardon and emancipation from villenage which his counselors had no intention to carry out ... the immediate result was a strong and cruel reaction when every promise made to the peasants in the hour of need was broken and a bloody assizes made a mock of the pardons granted by the King."⁶⁹ These and other similar practices eventually resulted in the revolution of 1399 which forced Richard to abdication. Nevertheless, Henry VI followed his example in 1450 in pardoning Jack Cade and then, once the danger was past, offering a reward for the rebel leader's capture, dead or alive.⁷⁰

The strong Tudor king, Henry VIII, succeeded in restoring faith in the king's word to such an extent that when, in the spring of 1513, he pardoned all the rioters brought in chains before him, numerous offenders who had not been taken surrendered themselves willingly in order to take advantage of the king's pardon.⁷¹ Henry also reasserted the principle of the exclusivity of the pardoning power to the king. The Act of 27 Henry VIII, Chapter 24, provided that no one had the power to pardon or remit any treason or felonies, but that the whole and sole power rested in the crown -- thus depriving ancient fiefs, county palatines, the Commons, and the church of a great part of the powers they had exercised under old grants. His daughter, Elizabeth, also succeeded in dominating Parliament. During her reign, Sir Edward Coke wrote his famous *Institutes of the Laws of England*, describing the development and status of

English common law to date. Of the royal prerogative of clemency, he wrote: "A pardon is a work of mercy whereby the King, either before attainder, sentence, or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical."⁷²

The pardon today is exercised to overrule a very elaborate system of criminal law in order to avoid injustice in extraordinary circumstances which that system does not cover. During the period of the law's early development, the function of royal clemency was somewhat different. The law was static and rigid, and no regular means existed for such modern pleas as insanity or self-defense; nor was there any provision other than the royal pardon for mitigation of punishment due to the extreme youth or age of the accused. Thus, the pardon played a decisive role in the development and refinement of the criminal law through its exercise in cases where the strict application of the law seemed undesirable.

Under capable and popular rulers like the Tudors, then, the occasional abuses which resulted from the unrestricted exercise of the pardoning power by the sovereign were tolerable due to its mitigating effect on the severe criminal penalties of the time. With the accession of the Stuarts after Elizabeth's death, however, the question of whether the king ruled as an absolute monarch by divine right -- with full powers to make laws and suspend their execution according to his will or whim -- or whether he ruled by the consent of his subjects, and, therefore, must govern according to the law, once again became a point of contention. The Stuarts not only claimed divine right, but pursued

a policy of discrimination against their Puritan opponents, often imprisoning them without trial. Under the early Stuart kings, James I and Charles I, the pardoning power became a political instrument and a means of revenue beyond the control of an antagonistic parliament.

In the early years of his reign, James I created a public scandal by pardoning one of his courtiers who had been convicted of murder. His son Charles, in an effort to raise money to support his government during the eleven years he ruled without convening Parliament, actually revived obsolete offenses in order to collect fines and payments for royal pardons.⁷³ The policies of these two kings and their insistence on divine right ended in the long and bloody English Civil War.

Under Oliver Cromwell's Protectorate, England came to be practically under martial law. Military police and censors enforced the Protector's moral "blue laws" and the arbitrary will of the major-generals who controlled the twelve districts into which the Commonwealth had been divided.⁷⁴

Among the first acts of Charles II with the restoration of monarchy in 1660 was a declaration promising that all rebels against his father should be pardoned except those designated for punishment by Parliament; he thus managed to keep vengeful bloodshed at a minimum.⁷⁵ Charles remained ever mindful of the consequences of his father's bid for absolute power and consistently avoided antagonizing Parliament or the people; in exile throughout his youth, his one clear resolve was to remain on the throne. In aid of that goal, he hoped to reconcile his country's disparate religious factions. His predominately

Anglican Parliament was not so inclined. It immediately embarked upon a program of persecution against Dissenters and Puritans. Under the Quaker Act of 1662 alone, more than 5,000 Quakers were imprisoned.⁷⁶

The Pardon in Colonial America

Soon to be among them was a recent convert, William Penn, the son of a high-ranking admiralty official. In the years to come, Penn would be imprisoned many times for his religious beliefs and would become one of the most outspoken champions of religious freedom. Through his father, he was acquainted with some of the most powerful men in government, including the king's Catholic brother, James, the Duke of York. As a member of the newly formed Whig Party, Penn advocated a limited monarchy, but he stopped short of joining his colleagues' demands for a Protestant succession, an indication that he knew the value of his association with James Stuart.⁷⁷

In 1664, James had been granted a charter for the region then occupied by the Dutch in North America, but soon to be captured by the English, whose borders roughly corresponded to present-day New York and New Jersey. A few months after acquiring the territory, he transferred the part between the Hudson and Delaware rivers to two other noblemen. Nine years later, one of them, in turn, sold his proprietary rights to Quakers. It was at this point that William Penn first became involved in the colonial concerns which were to occupy him most of his life.

Penn brilliantly negotiated the complicated questions of proprietary rights and privileges in East and West New Jersey. He became a trustee and proprietor

of both and ultimately succeeded in freeing them from the authoritarian political institutions which ruled New York, and from the Duke's power to tax them. By 1680, however, he had begun to dream of a settlement where he could be the sole proprietor, controlling the land for his own financial gain while granting the settlers self-government and religious liberty and experimenting with other political reforms.⁷⁸

In this, too, he was successful. The following year, Charles II granted a charter making him proprietor of the province of Pennsylvania, on land extending westward from the Delaware River between James Stuart's New York and Lord Baltimore's Maryland. It is a testament to Penn's influence and persuasiveness that not only did he succeed in obtaining it at a time when proprietary grants were in disfavor with the royal government, he obtained it on the terms his intentions required.⁷⁹ The charter gave him, as proprietor, broad, almost unrestricted, powers to govern the province as he saw fit. In the section relating to the right of government, the charter stated: "Know ye therefore that we, reposing special trust and confidence in the fidelity, wisdom, justice and provident circumspection of the said William Penn, ... do grant free, full and absolute power ... to him and his heirs ... for the good and happy government of the said country ..."⁸⁰

Specifically included were the power to appoint any and all judges and officers, the power to make laws "with the advice, assent, and approbation of the freemen, and the power "to remit, release, pardon, and abolish, whether before judgment or after, all crimes and offenses whatsoever committed within the said country against the said laws, treason and willful and malicious murder only excepted;

and in those cases to grant reprieves until our pleasure may be known therein, and to do all and every other thing and things which unto the complete establishment of justice ... do belong."⁸¹ The charter reserved to the crown the right to determine appeals and required that Penn's laws "be not repugnant or contrary, but as near as conveniently may be agreeable" to the laws in England. An attempt was made to make the latter provision enforceable by empowering the king to declare null and void any law passed in the province. No other proprietary or corporate colony had such a charter provision, one which might have proved even more restrictive if Penn's friends in the government had not succeeded in inserting a clause allowing the colonists five years to transmit a law after its passage.⁸²

England's continuing internal conflicts had had a strong effect on criminal law. Capital offenses, which had numbered eleven at the time of Bracton and thirty-one during the reign of Elizabeth, had increased to fifty-eight by 1680. Prisoners in felony cases were denied counsel except for the argument of special questions of law arising during the trial, and then only by the sufferance of the judges. It was a misdemeanor to help a prisoner on trial, even by whispering a word to him. There was no right to call witnesses for the defense, and if called, they were not usually sworn. No right of new trial was recognized, and there was no appeal except to the clemency of the king. Jurors could be, and often were, fined or imprisoned if they granted an acquittal not sanctioned by the judges. The only countervailing force in the English law of the time was the long-recognized doctrine of judicial reprieve, according to which judges were not bound to the law but could remit or mitigate punishment according to the circumstances of a case or their own humane impulse of the moment.⁸³

From his study of English law, and of the Duke of York's laws which had previously governed part of his new province, Penn concluded that the multitude of offenses and the severe punishments listed under them were not only unreasonable and intolerable, but inapplicable and insufficient. In 1683, he and his counselors prepared a code of criminal laws in which capital punishment was prescribed for only two crimes: treason and premeditated murder.⁸⁴ The code was duly enacted, approved by the freemen and transmitted to England where it was immediately disallowed by the king's Privy Council. The colonists re-enacted it, and the resulting conflict continued for many years.

In 1700, the Privy Council similarly rejected a law permitting affirmations in place of oaths. Some judges and other colonial officials not only refused to be sworn but permitted others to affirm as well, to the end that courts were not held as usual and convictions, when had, were attacked as unlawful. Criminal sentences were imposed with no certainty of execution because so many were questionable under either the colonial laws or the laws of England. Acts were passed by the provincial legislature, vetoed by the king in council, re-enacted and re-vetoed. Within a few years, conditions had become intolerable. In 1718, David Lloyd, Chief Justice of the province, prepared a compromise act recognizing the right to affirm, but also declaring in force a long list of English criminal laws previously omitted from colonial penal codes. The act further provided, however, that the accused should be entitled to challenges, have learned counsel assigned him, and could compel attendance of his witnesses, who would be sworn or affirmed in the same manner as the witnesses for the prosecution.⁸⁵ The moderate substantive views put forth by Penn were thus set aside in favor of the more immediately apparent need for

procedural reform. Although the succeeding half century saw a number of modifications of the act, it remained substantially unimproved right up to the outbreak of the revolution. In 1776, there still remained eighteen primary capital crimes, and the death penalty for a second conviction for every felony not capital on the first with the sole exception of larceny.⁸⁶

Like most laws not in concert with the sentiments of the people whose actions they are intended to regulate, the sanguinary provisions of the compromise Act of 1718 were irregularly enforced and frequently mitigated by other means, especially executive clemency. Burglary, a capital offense under the 1718 code, was rarely charged and convictions were even more rare. From the passage of the act to 1774 there were only seventy-three convictions, thirty-seven of which were pardoned. Horse-stealing provides an even more obvious example. During the same period, a total of three convictions were obtained and all of them were pardoned.⁸⁷ Among the priorities mandated by the state's first constitution, adopted September 28, 1776, was a reform of the penal code along the lines of that originally proposed by William Penn.⁸⁸

Executive Clemency in the United States

When the colonies made their decision to break with England, the authors of the new state constitutions were faced with the problem of finding a new basis for the pardoning power to replace the English theory that it resided in the king as a royal prerogative. In general, it was assumed that the power to pardon, like all powers of government, resided in the people. Conflicts arose, however, around the question of which branch of the people's government was to exercise it for them.

Although most of the early constitutions which replaced the colonial charters in 1776 followed historical precedent in vesting the power in the executive, most also tended to place restrictions on the governor's power generally, including the power to pardon. This should not be surprising, since it was the members of the colonial legislatures who had initiated the revolution while the governor had previously been an appointee of the king. Even Pennsylvania, which had enjoyed the liberal proprietorship of Penn and his heirs, felt the need to limit the powers of the executive. Pennsylvania was one of the six states whose constitutions provided that the governor (or "president") could pardon only with the consent of the executive council.⁸⁹ (The other states choosing this form were: Massachusetts, New Hampshire, New Jersey, Virginia and the newly formed state of Vermont.)⁹⁰ Georgia deprived the governor of the pardoning power entirely, giving him only power to reprieve until the next meeting of the assembly, which then could make such disposition of the matter as it saw fit.⁹¹ Connecticut and Rhode Island continued to function under their colonial charters, by which the pardoning power was exercised by the general assembly.⁹² Only five states left the pardoning power in the governor alone: Delaware, Maryland, New York, North Carolina and South Carolina.⁹³

After the disastrous experiment with decentralized government under the Articles of Confederation, however, advocates of a strong executive became more vocal. The framers of the Constitution of the United States gave the pardoning power to the president, without supervision of any other official

or agency and with the sole limitation that he may not exercise it in cases of impeachment.⁹⁴ In support of this provision, Alexander Hamilton wrote in *The Federalist*: "Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."⁹⁵

At the same time, the executive councils which a number of states, Pennsylvania included, had set up as a means of dispersing executive power had begun to prove too unwieldy for administration. As these councils were abolished, the power to pardon tended to remain with the governor alone. This was done in Pennsylvania in 1790, when a new constitution was framed along the lines of the recently adopted federal model.⁹⁶ In Georgia, which had previously vested the power in the legislature, it was also given exclusively to the governor in the same year.⁹⁷ Other states were not so quick to change. Virginia did not abolish its executive council until 1850, and in Connecticut there was no pardoning power at all until 1935.⁹⁸ Rhode Island transferred the power from the legislature to the governor in 1854, but later restricted the governor's power by requiring the advice and consent of the senate.⁹⁹

Of the new states being admitted to the Union, the great majority provided for the exercise of the pardoning power by the governor alone. Toward the end of the nineteenth century, states began to recognize the need to provide the governor with some assistance in the form of an advisory pardoning

officer or pardon board. Pennsylvania was the first such state, with the board provided for in the Constitution of 1874.¹⁰⁰ As we shall see, however, the creation of the board was intended at least as much to curb abuses of the pardoning power as to help relieve the governor of the burden of its exercise. For whatever reasons, during the years 1897-1918, advisory boards were set up in twenty-three states and advisory pardon officers in seven.¹⁰¹ At about the same time, several states set up pardon boards to actually exercise the pardoning power. Typical of these were Nevada, where a board with the governor as a member was set up in 1864, and Florida, where a similar board was created in 1868.¹⁰²

Since that time, although most states have retained or established advisory bodies or officers, the trend toward actually limiting the governor's power to make pardon decisions has not been overwhelming. At present, twenty-seven states vest the final decision-making power in the governor alone.¹⁰³ Three New England states (Maine, Massachusetts and New Hampshire) continue to require the advice and consent of the executive council while Rhode Island, as previously mentioned, gives this power of review to the senate.¹⁰⁴ The remaining nineteen states have pardon boards. In Alabama, Connecticut, Georgia, Idaho, South Carolina, Utah, Minnesota, North Dakota and Nebraska the power is vested exclusively in a board, with the governor a member in the latter three.¹⁰⁵ In Florida and Nevada the governor is also a member of the board, and is given an effective veto over favorable decisions, since he must vote with the majority in order for the pardon to be granted.¹⁰⁶ Seven states have systems similar to the one used in Pennsylvania, with the governor

having an effective veto over favorable recommendations by a board which does the actual deliberating. They are: Arizona, Delaware, Louisiana, Montana, Oklahoma, South Dakota and Texas.¹⁰⁷

All told, thirty-two states have boards serving either advisory or decision-making functions in the pardoning process. The compositions of, and selection procedures for, these bodies are so divergent as to be virtually impossible to categorize. Qualifications range from *ex officio* membership by governors, lieutenant governors, attorneys general, supreme court justices and other elected and appointed officials in government through membership in the various professions to no qualifications at all. Compensation for membership is equally varied.¹⁰⁸ Briefly, it may be said that the Pennsylvania board is not uncharacteristic, but is in many ways better qualified than the average.

The Pardoning Power in Pennsylvania

It has been said that the delegates to the Pennsylvania Constitutional Convention of 1790, in seeking to improve the decentralized, over-democratic and inefficient Constitution of 1776, "tried to compromise by setting up an administrative aristocracy upon the foundation of an electoral democracy."¹⁰⁹ Though this evaluation is in some ways an exaggeration, the state did have one of the most liberal franchise laws in the nation, while the powers granted its governor were more extensive and more uncontrolled, particularly with regard to patronage appointments, than those of any other state executive.¹¹⁰ The result was that while the rest of the country was enjoying an "era of good feeling" in politics, Pennsylvanians plunged immediately into partisan strife

as various interests vied for control of the gubernatorial pork-barrel.

Under a system built upon patronage, it is not surprising that other aspects of executive privilege such as the pardoning power should become subject to corruption and abuse. The fourth governor under the 1790 Constitution, William Findlay (1817-1820), a former State Treasurer who was nearly impeached on charges of misuse of state funds while serving in that office, granted 530 pardons and 774 remissions of fines and forfeitures in his single three-year term.¹¹¹ During the last year of Findlay's administration, Dr. James Mease, a distinguished member of the American Philosophical Society, wrote in reference to the pardoning power: "I have no hesitation in saying that the continual and monstrous abuse by governors of this great privilege is a very powerful cause of the increase of crime and that the best code of penal laws that can be framed will be defeated unless it is checked ... governors have much to answer for who thus defeat the laws and offer a premium for vice."¹¹²

Although no subsequent governor ever achieved the heights of abuse reached under Findlay's administration, the pardoning power remained a subject of controversy. As an historically royal prerogative now vested in a democratically chosen governor under a system that at best subjected him to a continual stream of applicants for favors, and at worst actually fostered corruption, the privilege of granting clemency was naturally subject to abuse. Even when no real abuse existed, complaints were still frequent simply because the power and the reasons for its exercise were secret and uncontrolled.

In 1829, an act revising the penal code with substantial amelioration of punishments was expected to just as substantially reduce the need for recourse to executive clemency.¹¹³ The penal system created by the act was not, as its authors apparently hoped, the perfect and ultimate answer to the needs of criminal justice, but despite the fact that the number of pardons granted actually did decline during the administration of Governor George Wolf (1829-1835), criticism of the power continued.¹¹⁴

At the Constitutional Convention of 1837, one delegate spoke of "extensive complaints ... of the abuse of the pardoning power," and offered an amendment which would transfer the power to the legislature which could exercise it on the recommendation of the governor.¹¹⁵ Another proposal sought to limit the governor's power by requiring the recommendation of the judges of the courts of sentence.¹¹⁶ Both were struck down by wide margins, and in the end the wording of the section relating to the governor's power to pardon was left unchanged and unrestricted.

Through the next two decades, the pardoning power continued to be exercised much as it had been before, and gubernatorial aspirants continued to conjure up real or imagined abuses by incumbents. In 1860, the criminal code was again liberalized, and again it was expected that the result would be a corresponding decrease in the use of executive clemency. Section 181 in particular is worth noting: "Where any person hath been or shall be convicted of any felony not punishable with death, or any misdemeanor punishable with imprisonment at labor, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so

endured shall have the like effect and consequences as a pardon by the governor as to the felony or misdemeanor whereof such person was so convicted." An exception was made for second convictions and cases of "willful and corrupt perjury".¹¹⁷ In introducing the section, the Code Commission noted: "It is founded on the principle that once the offender has suffered the punishment inflicted by law upon his crime, he should be restored to society without any further legal taint. This follows as a logical consequence from the principle of our legal system, that the great object of punishment is the reformation of the offender. In effect, the object of this statute is at present attained through the pardon of the governor, which is continually invoked to restore such persons to their competency as witnesses, after they have fulfilled the sentence of the law. A large portion of the pardons actually granted by our governors are given to persons so circumstanced."¹¹⁸

Because the provisions of this act actually eliminated the need for pardons intended to restore a convict's citizenship and because the new code also eliminated statutorially imposed minimum sentences -- thus allowing judges to take notice of special circumstances in fixing minimums which formerly could receive recognition only at the hands of the governor -- it was widely believed that the number of pardons would be greatly reduced. This assumption once again, proved unfounded, though in point of fact, it must be noted that it never really received a fair test. With the outbreak of the Civil War, the government, and in particular the executive, assumed a fundamentally different posture. Pennsylvania's war governor, Andrew Gregg Curtin, was aggressive in

performing the duties of his office at all levels. With the cessation of hostilities, Curtin, a long-time Lincoln supporter, aligned himself with Andrew Johnson against the radical Republicans on the issue of reconstruction; in 1866, he granted 249 pardons.¹¹⁹

The pardon also continued to be an object of politically-inspired muckraking. Earlier in 1866, the New York *Times* had reported: "Governor Curtin having been censured by certain newspapers in Pennsylvania for the too frequent exercise of the pardoning power, a correspondent of the Pittsburgh *Commercial* gives the official figures, which refer to the number of pardons issued to criminals in Allegheny County during the last fifteen years. For the five years of the administration of Governor Curtin, thirty-nine persons convicted of crimes have received clemency at his hands. The five years immediately preceding his term, forty-five pardons were issued, and for the same number of years previous to the last mentioned time, sixty-six."¹²⁰

Curtin's successor, John W. Geary, suffered similar attacks, with the result that in his 1868 report to the legislature, he specifically commented on the accusations that had been made against him and cited figures aimed at proving them false.¹²¹ "Upon investigation," he wrote, "it has been ascertained that a custom prevails in the Court of Quarter Sessions of Philadelphia to reconsider, remit, and change sentences weeks and months after their delivery, and that in this, much of the misrepresentation has originated. During the last year as many convicts were thus liberated from the Moyamensing Jail as were pardoned by me from all the prisons in the Commonwealth."¹²² Four years later,

Democrats leveled the absurd charge that prisoners had been released to swell the Republican vote in the presidential election of 1872.¹²³ The *Pittsburgh Post* (Democratic), in commenting on abuses of the pardoning power, declared: "Of late this power has been exercised with so free a hand that lawyers of influence have no hesitation in bargaining for fees contingent upon obtaining pardons for convicted clients; the administration of the criminal law is becoming more and more a farce, and has in some measure become a net in which only the little fish are caught, while the big ones contrive to break through the meshes."¹²⁴

Regardless of the efficacy of these charges, when the new Constitutional Convention convened on November 12, 1872, it seemed certain that their deliberations would include the drafting of some new provision for the exercise of executive clemency. The *Journal of Prison Discipline* in January, 1873, commented: "It is generally assumed that the pardoning power will be taken from the executive of the state, or at least divided between him and some other functionaries. We do not know that such will be the case, but certainly public opinion, as expressed through the ordinary channels, seems to leave little doubt of some change ... The pardoning power must be perpetuated somewhere ... but if there must be a pardoning power, then the people (the source of all power) decide that it shall not be exercised entirely by the executive. Who shall supply the place of the governor, or who shall assist him in his place? ... This society has expressed its views of the necessity of some change of the depository of the pardoning power and that change must almost of necessity

require a 'board' or 'council'. How that shall be composed, we have suggested rather negatively than positively, but prudence and experience must dictate."¹²⁵

Ironically, the chairman of the Committee on the Executive, which was to consider these questions about the pardoning power, was one of those who had suffered accusations of abusing it: former Governor Andrew Gregg Curtin. As originally read out of committee, the revised section provided that the governor be allowed to exercise the power only "upon recommendation of the Secretary of the Commonwealth, the Attorney General, the Superintendent of Public Instruction, the Secretary of Internal Affairs, or any three of them."¹²⁶ This model was immediately met by a wave of objections and qualifications, both major and petty. Some argued that the two appointed officials should be replaced by the Auditor General and the State Treasurer, both elected; others proposed a "Court of Pardons", convened by the Chief Justice of the Supreme Court.¹²⁷ One delegate even suggested that the Board of Pardons include all living ex-governors, but withdrew his proposal when Curtin objected: "If you want your ex-governors to live, in the name of mercy do not place this burden upon them."¹²⁸ A speaker in support of one amendment revealed the thinking of many delegates in expressing the view that the pardoning process should be made "as torturous as possible".¹²⁹

In response, Curtin and his supporters outlined the reasons behind their proposed board. First, pardoning should not be impossible; therefore, the Pardon Board should be a part of the executive. Second, the creation of a new tribunal

would incur unnecessary expense to the state and so all members should serve *ex officio*. Curtin summarized by saying: "Now this provision was designed ... for the protection of the executive power. For I would not degrade the office of the executive of Pennsylvania in surrounding him by any board or council of pardons to interfere with the discharge of any of his official duties. This provision ... does not lessen the dignity of the high office of the executive, but it provides that this extraordinary power of pardon shall be exercised by that officer only after the application, the names of the applicants and the reasons for the application have been sifted through an examination by four of the most distinguished citizens of the Commonwealth."¹³⁰

It should be noted that former Governor Curtin was very advanced in his thinking. He saw the pardoning power of the governor as a rehabilitative tool: that is, as a means of releasing prisoners "when they have served enough time to be chastised for their crimes, but before prison turns them into hardened criminals", regardless of the sentences imposed by the courts.¹ He argued that the pardoning power had not been abused nearly so much as the public apparently supposed, and added ironically that, on the other hand, whenever the power was exercised, the executive was "almost always abused by someone for doing so".¹³² He believed that the dignity of the governor's office required the power to exercise governmental mercy and he used all of his considerable oratory powers to support this view before the convention. He concurred readily, however, when an amendment was offered to his committee's proposed board requiring that its members meet together in open session (in order that pardon brokers could not obtain the agreement of one member by

pressure or bribery, and then that of the other members by contending that the application had been thoroughly examined by the first), and that their recommendations be made a matter of public record.¹³³

In the end, the Superintendent of Public Instruction was eliminated from the board because of a widespread belief that election to that office should not be influenced by any criteria other than the qualifications of the candidates as educators and the newly-created office of Lieutenant Governor was substituted, leaving a board comprised of two elected and two appointed officials.¹³⁴ The final draft, ultimately adopted as part of the Constitution of 1874 (Article IV, Section 9), read: "He [the Governor] shall have power to remit fines and forfeitures, to grant reprieves, commutations of sentences and pardons, except in cases of impeachment, but no pardon shall be granted nor sentence commuted except upon the recommendation in writing of the Lieutenant Governor, Secretary of the Commonwealth, Attorney General and Secretary of Internal Affairs, or any three of them, after a full hearing, upon due public notice, and in open session; and such recommendations, with the reasons therefor at length, shall be recorded and filed in the office of the Secretary of the Commonwealth."

This remained the law in Pennsylvania until 1967, when an amendment to the Constitution changed the membership of the board and relocated the filed recommendations from the office of the Secretary of the Commonwealth (no longer a member) to that of the Lieutenant Governor. Article IV, Section 9 of the Constitution of Pennsylvania, as amended, now provides:

- (A) In all criminal cases except impeachment, the Governor shall have the power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation, in writing, of the majority of the Board of Pardons, after a full hearing, in open session, on due public notice. The recommendations with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.
- (B) The Board of Pardons shall consist of the Lieutenant Governor, who shall be chairman, the Attorney General, and three members appointed by the Governor with the consent of two-thirds of the members elected to the Senate, one for two years, one for four years, and one for six years, and thereafter for full terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania and shall be recognized leaders in their fields; one shall be a member of the bar, one a penologist, and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.

As this is the present law, we shall discuss the composition and duties of this board at length in a later chapter.

In 1923, the Board of Pardons was made a part of the Department of Justice, and under the same Administrative Code, and the revision that followed in 1929 the constitutional provisions relating to it were confirmed statutorily.¹³⁵ Under the Act of May 1, 1929, (P.L. 1184, Sec. 1) the board was given additional responsibility as Pennsylvania's parole authority. Two years later, it was provided by law that: "Whenever the Board of Pardons shall request information and advice relative to any application for pardon or commutation of sentence from the judge who tried and sentenced the applicant or the district attorney or assistant district attorney who prosecuted him or her or from

the district attorney in office at the date of the application, it shall be the duty of the judge, district attorney or assistant district attorney, promptly to comply with such request."¹³⁶ In 1941, the power to supervise prisoners on conditional release was transferred to the newly created Board of Probation and Parole.¹³⁷ In a 1957 act amending the Administrative Code of 1929, the Board of Pardons was charged with adopting specific rules and regulations governing its actions.¹³⁸

Summary and Conclusions

Rightly or wrongly, the clemency function in Pennsylvania has suffered numerous allegations of abuse and as a result has undergone several constitutional changes affecting the power of the executive to grant clemency.

Beginning with the 1776 Constitution the governor was vested with authority to grant clemency, but only with the consent of the Executive Council. This arrangement existed for fourteen years when the governor was given the exclusive power of clemency in 1790.

For eighty-four years the exclusive power of the governor to grant clemency continued in existence amid numerous allegations of abuse of such power, usually based on the number of offenders granted clemency of one type or another. During this same period, the penal laws underwent some changes which accomplished some of the things which formerly only the pardon power could accomplish. The restoration of rights taken away by a criminal conviction is the most significant of these.

Since 1874 the constitution has provided for a Board of Pardons to review and make recommendations to the governor on clemency petitions, restricting the power of the governor to grant clemency only upon the recommendations of the Board of Pardons. While the governor can deny clemency recommended by the Board of Pardons for favorable action, he cannot grant clemency which has not been favorably recommended by the Board of Pardons. This, then, gives the Board of Pardons authority to deny a clemency by its failure to make a favorable recommendation to the governor.

The last constitutional revision concerning clemency took place in 1967, and merely changed the membership of the Board of Pardons. No changes were made in the power of the Board of Pardons or the governor.

Thus, for the past ninety-nine years Pennsylvania has dealt with clemency matters by a constitutionally authorized board sharing the powers with the governor -- one of only ten states so dividing the clemency powers. Twenty-seven states vest clemency power exclusively in the governor.

In promulgating a Model State Constitution in 1968 the National Municipal League called for the governor of a state to have the power to grant reprieves, commutations and pardons "...for all offenses and may delegate such powers, subject to such procedures as may be prescribed by law."

The analysis of the exercise of the clemency power as presented in Chapter III reflects a minimal use of clemency in the state, and, as we there say,

an inadequate use of it. The recommendation we make is that the traditional embodiment of clemency power in the governor be restored to him by constitutional and statutory revision. The point is further discussed in Chapter IV.

THE HISTORICAL BACKGROUND OF CLEMENCY: NOTES

1. *Webster's Unabridged Dictionary* (2nd. ed., New York, 1956), p. 337.
2. *Odyssey*, IX, 12.
3. Crispin, James P., *The Pharohs* (New York, 1953), p. 4.
4. Westermarck, Edvard A., *The Origin and Development of the Moral Ideas* (2nd. ed., London, 1912-1917), Vol. I, pp. 57-58.
5. *Exodus* 25:21
6. *Deuteronomy* 24:16; also: *Ezekiel* 18:20
7. The near-destruction of the tribe of Benjamin in *Judges* 20-21 serves as a potent example; the story concludes with the note (21:250: "In those days there was no living in Israel: every man did that which was right in his own eyes."
8. *Joshua* 20; *Numbers* 35:11-33
9. Bonner, Robert J. and Gertrude Smith, *The Administration of Justice from Homer to Aristotle* (Chicago, 1930), p. 6.
10. Aristotle, *Constitution of Athens*, ch. 39.
11. Plato, *Republic*, VIII, 558.
12. Plutarch, *Lives of the Noble Grecians and Romans*, "Life of Demosthenes", p. 27.
13. Hammond, N.G.L., *A History of Greece* (Oxford, 1967), p. 153.
14. Gibbon, Edward, *The Decline and Fall of the Roman Empire* (D.M. Low abridgment, New York, 1960), pp. 43-46.
15. *Luke* 23:17; *John* 18:39
16. The case of Horatius, a Roman hero who murdered his sister for making treasonable remarks, is illustrative. See: Livius, I, 26; Vide Cicero *de inv.* II, 78 seq. (cited in: *U.S. Attorney General's Survey of Release Procedures* (Washington, 1939), Vol. III, "Pardon", p. 12.

17. Plutarch, *Numa* 10
18. Douglas, David C. (ed.), *English Historical Documents* (New York, 1965), Vol. I, p. 109.
19. Gibbon, *op.cit.*, pp. 495-498; Bury, J.B., et al., *The Cambridge Medieval History* (London, 1949), Vol. I, pp. 360-365.
20. *Attorney General's Survey, op. cit.*, p. 14.
21. *Ibid.*
22. Bury, *The Cambridge Medieval History, op. cit.*, pp. 352 ff.
23. *Attorney General's Survey, op. cit.*, p. 15.
24. *Ibid.*, p. 16.
25. This practice reappears occasionally throughout Western history; as late as 1643, Virginia's colonial governor pardoned a robber "on the petition of Rose Alleyn, she agreeing to marry him." Scott, Arthur P., *Criminal Law in Colonial Virginia* (Chicago, 1930).
26. *Attorney General's Survey, op. cit.*, pp. 19-20.
27. *Ibid.*, pp. 16-17.
28. *Ibid.*, p. 17.
29. *Ibid.*, pp. 17-18.
30. Grimm, Jakov, *Teutonic Mythology* (London, 1883), Vol. III, p. 1152.
31. The magical associations which nakedness traditionally conjure up and the documented account of the intercession of the wife of Geoffrey of Mercia lend credence to this story. See: Grimm, *Ancient German Laws and Customs* (London, 1903), Vol. II, p. 517.
32. *Attorney General's Survey, op. cit.*, p. 22.
33. *Ibid.*
34. Garraud, R., *Treatise on the Theory and Practice of the French Penal Code* (London, 1921), p. 542.
35. Kant, Immanuel, *The Philosophy of Law* (ed. Carl J. Friedrich, New York, 1949), p. 198.
36. Beccaria, Cesare, *On Crimes and Punishments* (trans. Henry Paolucci, Indianapolis, 1963), p. 8.

37. Garraud, *op. cit.*, p. 543.
38. Bury, *The Cambridge Medieval History, op. cit.*, Vol. I, pp. 371-377.
39. Douglas, *English Historical Documents, op. cit.*, Vol. I, p. 215.
40. Bury, *The Cambridge Medieval History, op. cit.*, Vol. I, p. 395.
41. Thorpe, Benjamin, *Ancient Laws and Institutes of England* (London, 1840) Vol. I, pp. 2-25; see also: Douglas, *English Historical Documents, op. cit.* Vol. I (Doc. no. 29), p. 357.
42. Douglas, *English Historical Documents*, Vol. I, "The Laws of Alfred", p. 372 (Doc. no. 33: Int. 43).
43. Thorpe, *op. cit.*, p. 171.
44. In the laws of Ine, King of Wessex, the following appears: "He who captures a thief has a right to 10 shillings, and the king to the thief; and the kinsmen are to swear to him oaths that they will wage no feud ... If he is an *ealdorman*, he is to lose his office, unless the king wishes to pardon him." *English Historical Documents*, Vol. I, pp. 367-371 (Doc. no. 32:28, 363).
46. *Ibid.* *English Historical Documents*, Vol. I, p. 375 (Doc. no. 33).
47. *Ibid.*, *English Historical Documents*, Vol. I, p. 392 (Doc. no. 38:6).
48. *Ibid.*, *English Historical Documents*, Vol. I, p. 398 (Doc. no. 40:2).
49. Thorpe, *op. cit.*, Vol. I, p. 173.
50. Stearns (ed.) *The Germs and Developments of the Laws of England* (1889), as quoted in Smithers, William W., and George D. Thorn, *Treatise on Executive Clemency in Pennsylvania* (Philadelphia, 1909), p. 2.
51. Jenks, Edward, *A Short History of English Law* (London, 1934), p. 27.
52. *Ibid.*, p. 28.
53. *English Historical Documents*, Vol. II, p. 97.
54. Jenks, *op. cit.*
55. Trevelyan, G.M., *History of England* (New York, 1928) p. 91.
56. Jenks, *op. cit.*, p. 35.
57. *Ibid.*, p. 37.

58. *Tractatus de Legibus et Consuetudinibus Angliae*
59. Smithers, *op. cit.*, p. 6.
60. Holdsworth, W.A., *A History of English Law* (Boston, 1922) Vol. I, pp. 33, 40, 49.
61. Trevelyan, *op. cit.*, p. 147.
62. Bracton, Henrici de, *De Legibus et Consuetudinibus Angliae*, III:2, c. 14, *De Corona* (cited in Smithers, *op. cit.*, pp. 6-7).
63. Jenks, Edward, *Edward Plantagenet, the English Justinian* (U.S. ed., rev. P.B. Fairst; Athens, O., 1967), p. 17.
64. 2 Edw. III, c. 2.
65. 4 Edw. III, c. 13 (1330).
66. 5 Edw. III, c. 12 (1331)
67. *Attorney General's Survey*, *op. cit.*, pp. 29-32, 35-37.
68. *Ibid*, p. 33.
69. Trevelyan, *op. cit.*, p. 241.
70. *Attorney General's Survey*, *op. cit.*, p. 34.
71. Smith, Goldwyn, *A History of England* (New York, 1966), p. 265.
72. 3 *Institutes*, ch. 105, "Of Pardons" (cited in Smithers, *op. cit.*, p. 13).
73. Trevelyan, G.M., *England Under the Stuarts* (rev. ed. of 1946; London, 1957) p. 117.
74. Smithers, *op. cit.*, p. 347.
75. *Ibid.*, p. 355.
76. *Ibid.*, p. 356.
77. Illick, Joseph E., *William Penn the Politician* (Ithaca, N.Y., 1965), p. 33.
78. *Ibid.*, p. 36.
79. Penn's original plans seem to have included the creation of a completely open, democratic state. When his utopian ideals later came into conflict with a desire to protect his investment by maintaining control as proprietor, he yielded to the latter. See: Bronner, Edwin B., *William Penn's "Holy Experiment"* (New York, 1962).

80. Thorpe, F.N., *American Charters, Constitutions, and Organic Laws* (Washington, 1909) Vol. V, p. 3035. Spelling of all quotations has been modernized.
81. *Ibid.*, p. 3038.
82. Illick, *op. cit.*, p. 48.
83. Jenks, *op. cit.*, p. 175.
84. Smithers, *op. cit.*, p. 19.
85. I Sm. Laws, 105.
86. Blackstone, William, *Commentaries on the Laws of England* (New York, 1916).
87. Smithers, *op. cit.*, p. 29.
88. Pennsylvania Constitution (1776) Sec. 38.
89. Pennsylvania Constitution (1776) Sec. 20.
90. Mass. Const. (1780) pt. II, ch. ii, sec. 1, art. 8; N.H. Const. (1784); N.J. Const. (1776) art. IX; Va. Const. (1776); Vt. Const. (1777). The New Hampshire Constitution of 1776 was very brief and contained no provisions regarding the pardoning power.
91. Ga. Const. (1776) art. 2, sec. 7.
92. Conn. Charter (1662); R.I. Charter (1663).
93. Del. Const. (1776) art. 7; Md. Const. (1776), sec. 33; N.Y. Const. (1777) art. XVIII; N.C. Const. (1776) art. XIX; S.C. Const. (1790) art. II, sec. 7. The South Carolina Constitutions of 1776 and 1778 were very brief and said nothing concerning the pardoning power.
94. U.S. Const., art. II, sec. 2.
95. No. 74.
96. Pa. Const. (1790), art. II, sec. 9.
97. Ga. Const. (1789), art. II, sec. 7.
98. Va. Const. (1850), art. V, sec. 5. The Connecticut Constitution originally gave the governor power only to grant reprieves. In 1883, a board was created with the governor as a member, to grant commutations and effect early release from prison. Conn. Laws, 1883, ch. 108. Power to grant "pardons" was also conferred statutorily in 1935. Conn. Gen. Stat. (Supp. 1935), sec. 787C.

99. R.I. Const. (1854) as amended, art. 11 (2).
100. Pa. Const. (1874), art. IV, sec. 9.
101. *Attorney General's Survey, op. cit.*, p. 90.
102. Nev. Const. (1864), art. 5, sec. 14; Fla. Const. (1868), art. 4, sec. 8.
103. See: Appendix K.
104. Me. Const. (1917), art. V, pt. 1, sec. 11; Mass. Const. (1913), art. VIII, sec. 64; N.H. Const. (1784), art. 52; R.I. Const. (1854), art. 11 (2).
See also: Appendix A.
105. See: Appendix K.
106. *Op. cit., supra*, note 102. See also: Appendix K.
107. See: Appendix K.
108. See: Appendix K.
109. Klein, Philip Shriver, *Pennsylvania Politics, 1817-1832* (Phila., 1940), p. 24.
110. *Ibid.*, p. 25.
111. *Pennsylvania Archives* (4th series, Harrisburg, 1956), Vol. VIII, p. 884.
112. Vol. 52 of Pamphlets, Philadelphia Law Association Library; quoted in Smithers, *op. cit.*, p. 36.
113. Act of April 23, 1829, P.L. 341.
114. *Pennsylvania Archives, op. cit.*
115. *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution* (Harrisburg, 1838), Vol. IX, p. 290.
116. *Ibid.*, p. 289.
117. Act of March 31, 1860, P.L. 382, sec. 181.
118. King, Edward, John C. Knox and David Webster, *Report on the Penal Code*, (Harrisburg, 1860), p. 38.
119. *Pennsylvania Archives, op. cit.*
120. *New York Times*, January 27, 1866, p. 4.
121. *Pennsylvania Archives, op. cit.*

122. *Pennsylvania Archives*, *op. cit.*, "Papers of the Governors: John White Geary," Vol. VIII, p. 877.
123. Branning, Rosalind L., *Pennsylvania Constitutional Development* (Pittsburg, 19
124. *Pittsburgh Post*, November 26, 1872.
125. Quoted in Smithers, *op. cit.*, p. 40.
126. *Proceedings and Debates of the Convention of the Commonwealth of Pennsylvania to Propose Amendments to the Constitution* (Harrisburg, 1874), Vol. II, p. 351
127. *Ibid.*, p. 352.
128. *Ibid.*, p. 357.
129. *Ibid.*, p. 353.
130. *Ibid.*, p. 355.
131. *Ibid.*
132. *Ibid.*, p. 356.
133. *Ibid.*, pp. 359-360.
134. *Ibid.*, p. 380.
135. Administrative Code of 1929 (Act of April 9, 1929, P.L. 177), art. IX, sec. 909; 71 P.S. sec. 209.
136. Act of April 24, 1931, P.L. 71; 71 P.S. sec. 299a.
137. Act of August 6, 1941, P.L. 861, sec. 17; sec. 35 repeals inconsistent sections of Act of May 1, 1929, P.L. 1182; Act of May 1, 1929, P.L. 1184; Act of June 19, 1911, P.L. 1059. According to Purdon's, they are repealed insofar as they relate "to persons over whom exclusive jurisdiction to parole is vested upon the Board of Parole".
138. Act of July 19, 1957, P.L. 1016, sec. I; 71 P.S., sec. 299.

II. THE LAW OF PARDONS IN PENNSYLVANIA

II. THE LAW OF PARDONS IN PENNSYLVANIA

The pardoning power is generally thought of as one of the prerogatives inherently vested in the executive. European writers have usually spoken of it as an attribute inherent in the crown. We have seen that the power as a royal prerogative evolved as a natural consequence of the king's power to forgive offenses against his peace; that is, since the monarch embodies the government in his person, it is he who is injured when someone breaks the law and, therefore, it is he who has the power to forgive. This principle survives in England despite the fact that the king or queen no longer actually exercises the power, and that Parliament has long claimed and exercised the power to grant pardons by legislative act.

In the same way, the pardoning power in this country is generally thought of, particularly in the popular imagination, as being vested in the governor, in spite of the fact that, historically, legislatures have exercised concurrent power and in some states have held sole authority for granting clemency. In fact and in law, the pardoning power is neither inherently nor necessarily an executive power. It is a power of government inherent in the people who may by constitutional provision vest it in any official or department of government they may choose. 67 C.J.S., *Pardons*, Sec. 2 (1950). In Pennsylvania, the foundation and source of the power to grant pardons is conferred on the governor with the limitation that the Board of Pardons must recommend an application before he can act favorably on it. Pa. Const., Art. IV, Sec. 9.

The pardon in a democracy is no longer the prerogative of divine right, but is "an adjunct to the administration of justice recognized by all civilized governments as necessary by reason of the fallibility of human laws and human tribunals". *Diehl v. Rodgers*, 169 Pa. 316, 32 A. 424 (1895); U.S. *ex rel. Seiple v. Byers*, 127 F. 993 (1904). The pardon remains, however, an act of grace. It is not founded on any preliminary steps that furnish legal merits or a legal title, and there can be no right to it on any ground. *Commonwealth ex rel. Crosse v. Halloway*, 44 Pa. 210 (1863); U.S. *ex rel. McNelles v. Pa. Board of Parole*, 141 F.S. 23 (1956).

The Pardoning Authority

It has been held that the power of the governor to pardon is exclusive. *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 28 A.2d 897 (1942); *Frye v. Lawrence*, 75 Dauph. 168 (1960). The obvious argument here is that the Constitution vests the power in the governor (and, of course, the Board of Pardons), and that its exercise by any other branch or department would constitute an invasion of executive prerogative inconsistent with the doctrine of separation of powers. In the Act of May 1, 1861, P.L. 462, the legislature prescribed a system for commutation of sentences for good behavior. This act was found unconstitutional on the grounds that it interfered with the sentencing power of the courts, *Commonwealth ex rel. Johnson v. Halloway*, 42 Pa. 446 (1862). The Act of May 21, 1869, sought to overcome this unconstitutional feature by providing a system of commutation which would be effective through action by the governor in the exercise of his pardoning power. This act was upheld by *Commonwealth ex rel. Stewart v. Allegheny County*, 17 Dist. 134 (1908), lending

credence to the idea that only the governor may pardon or release a prisoner from confinement before the expiration of his sentence. Also upheld, however, was the Act of March 31, 1860, which provided for restoration of civil rights upon the completion of a sentence. The court noted that the power of the legislature to pardon in this way derived from its basic power to make laws. U.S. v. Hughes, 175 F. 238 (1892). Since the Board of Pardons presently recommends pardons only after completion of a sentence, it would appear that in this area, at least, the power to pardon may be exercised concurrently by the executive and legislative branches -- although their powers stem from different sources. It should be noted, however, that attempts by the legislature to issue individual pardons by name would probably be ruled invalid. U.S. v. Hughes, *supra.*; Brown v. Walker, 161 U.S. 591 (1896); Commonwealth *ex rel.* Magilner v. Hamburg Magistrate, et al., 104 Pa. Superior Ct., 221, 158 A. 629 (1932).

The most recent challenges to the exclusive power doctrine have come, not in the form of legislative attempts to exercise the pardoning power, but following the pattern of the "good time" commutations act of May 1, 1861, *supra.*, in statutes passed for other purposes which have been held to incidentally infringe on the exclusive power of the executive with regard to pardons. In Commonwealth *ex rel.* Banks v. Cain, *supra.*, a challenge was made to the law establishing probation and parole. The court ruled that, due to technical distinctions between commutation or conditional pardon and parole, the power of the governor to grant conditional pardons and commutations was not in conflict with the act establishing the parole board. Such decisions, often based

on a recognized need for broader scope in release procedures than executive exercise of the pardoning power can provide, support the concept that the powers of clemency are at least partially concurrent. Past judicial decisions supporting the right of the legislature to grant acts of general amnesty would also tend to support this view if such acts are not to be considered mere historical anomalies. U.S. v. Hughes, *supra.*; Brown v. Walker, *supra.*; Commonwealth *ex rel.* Magilner v. Hamburg Magistrate, et al., *supra.* See especially: Knote v. U.S., 95 U.S. 149 (1877), in which the Supreme Court noted the distinction between pardon and amnesty, as previously defined, and concluded that "the distinction between them is one rather of philological interest than of legal importance".

Wholesale adoption of the theory that the power is exclusive to the executive would endanger not only the already established probation and parole laws and the power to pass acts of amnesty (the legislative branch's own "safety valve" for periods of political crisis), but would stifle virtually all other innovative legislation with regard to early release of prisoners under supervision by state officers. As the court noted in Knote v. U.S., *supra.*, most attempted distinctions between the legislative and executive powers have been made in hopes of establishing the principle that the legislature retains a supplementary power to grant pardons in such cases as the executive does not cover. These arguments are rendered specious in Pennsylvania by the vast body of caselaw confirming the power of the governor and the Board of Pardons to pardon at any time and under any conditions. It would seem, then, that the power must be regarded as at least partially concurrent with the legislature, and that legislative abuses should ideally be

controlled by a constitutional provision against special legislation, such as individual pardons.

In the landmark decision of *Brown v. Walker*, *supra.*, the court held that the act of Congress "securing to witnesses immunity from prosecution is virtually an act of general amnesty and within the power of Congress". The court further stated that "although the Constitution vests in the President the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment, this power has never been held to take from Congress the power to pass acts of general amnesty". In *Commonwealth ex rel. Magilner v. Hamburg Magistrate, et al.*, *supra.*, this federal decision was recognized as a precedent in Pennsylvania. The court noted that while amnesty is usually granted to a class of offenders subject to trial but not yet convicted, what persons are entitled to the benefits and immunities of amnesty depends on the terms of the proclamation or act. It was held, therefore, to be within the power of the legislature to grant testifying witnesses immunity from prosecution.

The courts in the various states have held almost universally that where the constitution grants the pardoning power to the governor or to a board, this power is not subject to restriction or interference by the legislature. 16 C.J.S. *Const. Law*, Sec. 132 (1950); *Ex parte Garland* 4 Wall 333, 71 U.S. 333 (1866). In *Diehl v. Rodgers*, *supra.*, the Pennsylvania Supreme Court went further in noting that the establishment of the Board of Pardons as an advisory body to the governor constituted the furthest reaches of possible limits of executive

clemency and said that the power of the governor to grant pardons "cannot be further restricted or ... limited by legislation". Some state constitutions include an enabling clause making the pardoning power of the executive subject to such limitation as the legislature may prescribe, either in the manner of applying for a pardon or in its actual exercise. It has been held that only where such constitutional provisions exist can legislative statutes aimed at regulating the governor's pardoning power be considered binding. Since the Pennsylvania Constitution includes no such clause, it must be concluded that the decisions cited above are unassailable and that the legislature will remain unable either to limit the effect of a pardon or exclude from its exercise any class of offenders (a point which could become extremely important should Pennsylvania attempt to reinstate capital punishment).

As a general principle, courts have no power to grant clemency whatsoever. Arguments for relief because of mitigating circumstances or the peculiar hardship of a particular case must be addressed, not to the courts, but to the pardoning authority. An appellate court cannot grant relief in the absence of legal error in the case. In Pennsylvania, it has been held that courts may commute sentences until the end of the term of court, but not after. *Commonwealth v. Smith*, 18 D. & C. 460 (1932); *Commonwealth v. Soudani* 193 Pa. Sup. Ct. 353 (1960). In most states, the question of judicial invasion of the pardoning prerogative has arisen most often in connection with suspensions of sentence. It has been generally agreed that a court has the power to delay pronouncing of judgment for a reasonable time in order to hear motions for a new trial, to give the defendant time to perfect an appeal, to present a petition for pardon, or in other cases where such suspension is deemed necessary

and proper. Similarly, it is agreed that the court may grant a temporary suspension of the execution of sentence, even though it is admitted that such a suspension of execution is essentially the same as a reprieve. Although the reprieve is almost universally held to be included in the pardoning power, no constitutional objection to the concurrent exercise of this power by the executive and the courts has yet been successfully argued.

Indefinite suspensions of the imposition or execution of sentence, however, have been the subject of a good deal more dispute. Conflicts exist not only as to whether the courts have such power, but also as to the grounds upon which the power may be upheld or denied. It would seem that the inherent power to try cases and apply the law would not imply an equal discretion to refuse to do so, and, therefore, that if such power is to be exercised, it must be conferred statutorially and rather carefully defined.

The powers of the judiciary with regard to clemency actions taken by the executive are even more strictly circumscribed. The decisions of Pennsylvania courts since the establishment of the Board of Pardons have opposed any judicial interference whatsoever, repeatedly ruling that no tribunal has the right of review or even inquiry in cases of executive clemency. *Commonwealth v. Ahl*, 43 Pa. 53 (1862). In *Commonwealth ex rel. Gibson v. Board of Pardons*, 74 Dauph. 128 (1959), it was held that the Common Pleas Court is without authority to compel the Board of Pardons to waive its own rules, and, therefore, the court could not entertain a motion to permit the filing of a petition with the Board of Pardons without payment of the established filing fee. *Commonwealth ex rel. Cater v. Myers*, 412 Pa. 67, 194 A.2d 185 (1963) confirmed that the court can

review neither the conduct nor outcome of a Board of Pardons hearing and, therefore, that no imposition of rules of evidence or strict procedure can be made upon the Board of Pardons. It should be noted that this last ruling could appear to judge unconstitutional the Act of July 19, 1957, P.L. 1016, Sec. 1, which provides that: "The Board of Pardons shall adopt rules and regulations governing its actions and no hearings or recommendations ... shall be contrary thereto."

Not even in cases of arbitrary, unreasonable or mistaken exercise of the pardoning power by the executive may Pennsylvania courts decline to give effect to a pardon. *Commonwealth v. Ahl, supra*. Nor do procedural irregularities constitute grounds for declaring a pardon invalid. *Hoffman v. Coster*, 2 Wharton 453 (1837); *Commonwealth v. Ohio & Pa. R.R. Co.*, 1 Grant 329 (1856); *Hester v. Commonwealth*, 85 Pa. 139 (1878). In fact, the only recognized ground upon which the courts may question the validity of a pardon is an allegation that it has been obtained by fraud. In such cases, the court must follow the same procedures required to prove fraud in judicial proceedings. *Ex parte DePuy*, F. Cas. #3814 (D.C.S.D.N.Y., 1839); *Commonwealth ex rel. Crosse v. Halloway, supra*.

In some jurisdictions, county or municipal officials are empowered to grant pardons to persons convicted of violations of local ordinances. There is no such legislation in Pennsylvania, and it would seem that, due to the powerful caselaw supporting the rights of third parties to fines and costs (described below), such power would be difficult to exercise if provided. It is probable

however that, if passed, it would not be ruled unconstitutional, since the pardoning power of the state executive is not effective with regard to city and county ordinances. 67 C.J.S. *Pardons*, Sec. 3 and 5 (1950).

The Pardoning Power

The Pennsylvania Constitution provides that the governor's power to pardon shall extend to all criminal cases except impeachment, an exception also made by most other states. This restriction was first imposed on the king in England by the Act of Settlement of 1700, which provided: "that no pardon under the great seal shall be pleaded in bar to an impeachment by the House of Commons". The act probably resulted from the altercations arising out of the impeachment before the Commons in 1678 of the Earl of Danby, who pleaded in bar of such impeachment his pardon from Charles II. American constitutional restrictions go further than the Act of Settlement, however, in that they forbid the granting of pardons in impeachment cases altogether, while the king may still pardon after impeachment.

Since the constitution limits the governor's pardoning power to criminal cases, he is not empowered to pardon municipal violations or to exercise the power in civil cases. The established rule is that, where a third party has a vested interest, a pardon by the governor cannot affect that interest. This rule applies particularly to costs, fines and forfeitures. *Duncan v. Commonwealth*, 4 S. & R. 451 (1818); *Ex parte McDonald*, 2 Wharton 440 (1836); *Commonwealth v. Denniston*, 9 Watts 142 (1839); *Shoop v. Commissioner*, 3 Pa. 126 (1846); *Cope v. Commissioner*, 28 Pa. 297 (1857); *Commonwealth v. Shisler*, 2 Phil. 256 (1857); *Commonwealth v. Hitchman*, 46 Pa. 357 (1863); *Schuylkill*

Cty. v. Reifsnyder, 46 Pa. 446 (1864). As an example, in Shoop v. Commissioner, *supra.*, a man had been convicted of "peddling", for which the fine was payable one-half to the informer and one-half to the county. The court found that, although the defendant had been pardoned, the governor had no right to remit the fine where a citizen had a vested right to the same. He may, however, remit that part which is vested in the state, unless it has already been accounted to the treasury.

In Cope v. Commissioner, *supra.*, it was found that a pardon releases the grantee from fines except insofar as the commissions and fees of officers represent a vested interest therein. This is true even if the fine would have been paid to county officers rather than state officers. It was further held that the commutation of a sentence can have the same effect as a pardon with regard to fines and forfeitures, regardless of whether or not the language specifically awards remission. Commonwealth v. Hitchman, stated that fines, costs, etc. are not remittable after they have been paid. They may, however, be remitted before conviction, or before judgment and sentence, though after conviction.

In some jurisdictions the question has been raised whether the pardoning power of the executive extends to contempt citations by the judicial and legislative branches. It has been argued variously that such an interpretation of the governor's pardoning power would constitute a violation of the doctrine of separation of powers, or that so-called "criminal contempt" does not fall within acceptable definitions of criminal cases pardonable by the governor. The weight of authority, however, supports the proposition that criminal contempts

are pardonable, though it is agreed that the executive may not pardon civil contempts. The key decision is the federal case *Ex parte Grossman*, 267 U.S. 87 (1925), in which the Supreme Court ruled: "The pardoning by the President of criminal contempts has been practiced more than three-quarters of a century, and no abuses during all that time developed sufficiently to invoke a test in the federal courts of its validity." Similarly, no test case has yet arisen in Pennsylvania, but the trend toward a liberal interpretation of the governor's pardoning power in Pennsylvania caselaw would imply acceptance of the reasoning of *Ex parte Grossman*, should such a case arise.

That caselaw also asserts that pardons may be granted at any time after commission of the offense, whether before judgment or after, as long as any legal consequences of the offense remain. In *re Stetler*, 22 F. Cas. 314 (#13,380) (Circuit Court E.D. Pa., 1852); *Commonwealth v. Ahl*, *supra.*; *Commonwealth v. Hitchman*, *supra.*, *York Cty. v. Dalhousen*, 45 Pa. 372 (1863).

Pardons may also be granted conditionally, a principle established by *Commonwealth v. Hatsfield*, 1 Clark 177 (1842), and *Flavell's Case*, 8 Watts & S. 197 (1844). The latter case traced the power of executive clemency back to the Royal Charter to William Penn, then forward to the constitutional grant of the power to the Supreme Executive Council in 1776 and to the broader grant to the governor in the constitutions of 1790 and 1838. The right of the governor to grant pardons conditionally was confirmed on the grounds that the Executive Council under the 1776 Constitution had issued pardons on the condition that the convict leave the country. The court further cited the Act of January 28, 1777, transferring English Common Law to Pennsylvania. Referring

to the Common Law, the court found that pardons may be granted upon conditions precedent or subsequent. In *Commonwealth v. Haggerty*, 4 Brewst 326 (1869), it was decided that any condition may be attached to a pardon as long as it is not "illegal, immoral or impossible of commission". The court ruled that a void condition may void the pardon, especially if the pardon was specifically based on the voided condition. If the condition proves impossible, the pardon never becomes operative; if conditions subsequent are not fulfilled, the grantee can be remanded to finish his sentence. This ruling is in partial conflict with that of the earlier *Commonwealth v. Hatsfield*, *supra.*, where it was held that an illegal condition attached to a pardon is void and the pardon then becomes absolute. Taken together, the two decisions would seem to leave some room for interpretation with regard to the legality of particular conditions and their ultimate consequences for the recipient of the pardon. Subsequent rulings limiting the power of the courts to question decisions and procedures in the pardoning process (especially the previously cited *Commonwealth ex rel. Cater v. Myers*) could be seen as resolving this question in favor of the governor and the Board of Pardons, particularly since neither procedure nor precedent exists to allow a court of appeals to recognize as absolute a pardon which had been granted conditionally. In any case, it would seem that the fact that no test case has yet arisen is an indication that the public nature of the pardoning process in Pennsylvania has been and will probably remain a sufficient deterrent against the insertion of repugnant provisos in conditional pardons by the governor or the board.

In declaring that the grantee can be remanded to finish his sentence if conditions subsequent are not fulfilled, the court in *Commonwealth v. Haggerty, supra.*, was echoing the decision rendered in *Commonwealth v. Flavell, Vaux 157 (1842)*, where it was stated that pardons with such conditions attached go into effect but are rendered null and void by non-performance or violation of the conditions. The court in *Commonwealth ex rel. Stewart v. Allegheny Cty., supra.*, was more specific. After recognizing as valid the "good-time" commutations act of May 21, 1869, *supra.*, the court noted that on revocation of a conditional pardon, the legal status of the recipient returns to its condition prior to the pardon and that, if voided, a pardon must be plead anew. Where a convict has been pardoned on the condition that he not be convicted again, he may be remanded to complete both his original sentence and the sentence for the conviction by which he was found in violation. Further, the convict is not entitled to credit for the time that he was complying with the conditions, because compliance with a requirement in the conditional pardon is not an execution of part of the sentence imposed by the court. Therefore, the execution of the original sentence may still be enforced even after the term for which the prisoner was sentenced has expired. If no sentence had been passed when a conditional pardon was granted, a breach of the conditions permits the court to exercise jurisdiction over the prisoner. 67 C.J.S. *Pardons*, Sec. 16 (1950). A convict may also be retained for breach of conditions where the condition itself provides for his detention -- as in, for example, the commutation of a sentence which, while it reduces the term of imprisonment, does not effect the release of the prisoner.

In 1833, Chief Justice Marshall, writing the opinion in *U.S. v. Wilson*, *supra.*, declared that "a pardon is a deed, to the validity of which delivery is essential. And delivery is not complete without acceptance." This reasoning was recognized in Pennsylvania by the court in the case of *Commonwealth ex rel. Crosse v. Halloway*, *supra.*: "The intention of the executive to grant a pardon can have no real force until carried into completed act ... though the courts may, when the intention is satisfactorily shown, suspend further proceedings in expectation of the actual pardon. The completed act is the charter (or deed) of pardon. The completed act is the one and only step that gives title to a pardon. Until delivery, all that may have been done is a mere matter of intended favor, and may be cancelled to accord with a change of intention." The pardon in question had been granted by Governor Curtin on the basis of a fraudulent letter from the War Department requesting the services of Crosse for an unspecified mission behind enemy lines. The fraud was discovered and Crosse was returned to prison, his pardon apparently still in the hands of the warden. It was held that, under these circumstances, there was not sufficient delivery to render the pardon valid, even though delivery to the warden of the institution where the convict is confined is generally so considered.

Although the requirement of delivery has remained substantially unquestioned, Justice Marshall's further statement, that "delivery is not complete without acceptance" and that a pardon "may then be rejected by the person to whom it is tendered", has met with a number of legal and practical objections. Can, for example, a man sentenced to death insist that the sentence be executed

notwithstanding a pardon or commutation to the contrary? Can a prisoner insist on keeping his cell when the chief executive of the Commonwealth has ordered him released? It is difficult to imagine such cases, in which the rule would necessarily have to be tested directly; most cases in which it has been affirmed have turned on other points. In 1926, however, the United States Supreme Court did hear a case in which a federal prisoner condemned to death had had his sentence commuted by the president to life imprisonment. Sixteen years later, he filed a writ of habeas corpus alleging that the president had no power to grant a commutation changing the nature and character of the punishment and, further, that such a commutation was ineffective without his consent. The opinion of the court, written by Justice Holmes, held that the pardoning power could no longer be viewed as a private act of the executive; the power to mitigate punishments was, rather, a constitutional instrument for the improvement of justice and the public welfare. Justice Holmes wrote: "Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done. So far as a pardon legitimately cuts down a penalty, it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side, and on the other would leave the reduced term or fine valid and to be enforced and that the convict's consent is not required." *Biddle v. Perovich*, 274 U.S. 480 (1926).

This federal case notwithstanding -- and despite the fact that the three Pennsylvania cases specifically affirming the "delivery and acceptance" rule

(Commonwealth v. Shisler, *supra.*, Commonwealth *ex rel.* Johnson v. Halloway, *supra.*, and Commonwealth v. House, 10 Pa. Superior Ct. 259 [1899]) all occurred in the Nineteenth Century -- some question remains as to whether the rule still applies in the Commonwealth with regard to acceptance. A similar rule is applied with regard to probation and parole which derives from the same original decision, U.S. v. Wilson, *supra.* In that realm, the requirement of acceptance would seem to be on much firmer ground, since the recipient does not apply and must abide by conditions sometimes more onerous than the original punishment. One possible solution to the conflict might be the inclusion in pardon applications of a clause stipulating acceptance of the decision and any conditions which may be attached to it as implicit in the convict's act of applying. Due to the nature of the decisions in the caselaw cited above, however, grounds for legal challenges would probably still remain.

The Effect of a Pardon

Another major conflict with regard to the pardoning power has evolved around the question of its effect. In numerous cases, courts have said that a pardon is a remission of guilt as well as of punishment, that "it releases the punishment and blots out of existence the guilt so that in the eye of the law the offender is as innocent as if he had never committed the offense". *Ex parte Garland*, *supra.* Ironically, two Pennsylvania cases which quoted this federal decision and recognized it as law simultaneously qualified it. The court in the earlier case of Hoffman v. Coster, *supra.* had held that a pardon restores the grantee's competency as a witness because it blots out the source of any challenge -- that is, the very existence of the offense for which he was convicted. In Diehl v. Rodgers, *supra.*, the court affirmed that a pardon "blots

out guilt" and restores civil rights, including competency as a witness, but held further than his credibility was still for the jury to determine. (It should be noted that in the case in question, the witness had been pardoned for the crime of perjury.) Using almost exactly the same wording, and citing with approval a Georgia case, U.S. v. Athens Armory, 35 Ga. 344 (1868), which had held that a pardon restores the recipient to a state of innocence, the court in Commonwealth v. Quaranta, *supra.*, nevertheless agreed that the credibility of a witness is always for the jury to determine. Therefore, a pardoned prior conviction may be inquired into and the pardon may also be shown.

In Commonwealth v. Smith, 324 Pa. 73 (1936), the contrary principle was enunciated that a pardon relieves the offender only of the legal consequences of his crime and does not blot out either moral guilt or the fact of the crime itself. The court ruled that, although it is improper to introduce a pardoned conviction in seeking a verdict of guilty in a subsequent case, once the verdict has been rendered the fact of the previous conviction, notwithstanding the pardon, may be introduced for the purpose of sentencing under habitual offender statutes. The court in Commonwealth *ex rel.* Banks v. Caine, *supra.*, held that, regardless of whether or not it blots out judicial guilt, "a pardon ... completely frees the person pardoned from the control of the state. It not only exempts him from further punishment, but it relieves him from all the legal disabilities resulting from his conviction." It then added: "It blots out the very existence of his guilt so that, in the eye of the law, he is thereafter as innocent as if he had never committed the

offense." Five years later, the decisions in *Ex parte Garland, supra.* and *Diehl v. Rodgers, supra.*, were cited with approval in *U.S. ex rel. Forino v. Garfinkel*, 67 F.S. 846 (W.D. Pa., 1947).

In *Commonwealth v. Cannon*, 386 Pa. 62 (1956), the majority of the Pennsylvania Supreme Court read *Commonwealth v. Smith, supra.* as relieving the offender only of the consequences of conviction, ruling that a pardon does not blot out guilt or restore the recipient to a state of innocence. The court held, therefore, that a pardoned previous conviction was admissible for the purpose of aiding the jury in sentencing. Justice Musmanno, in a strong dissent, chastised the majority for its decision, arguing that this interpretation ran counter to basic common law. The case was complicated by the fact that the previous manslaughter conviction and the pardon had both been obtained, not in Pennsylvania, but in Maryland, and that that state's law clearly held that a pardon obliterates the crime itself only if it can be shown that the conviction was in error. In order that the decision should not be in doubt, however, subsequent courts in the case followed the example of the Pennsylvania Supreme Court in denying appeals not only on the grounds of reciprocity between the states, but also because, in their view, a pardon does not obliterate the crime itself. These courts further held that, even if the pardon obliterated the Maryland manslaughter conviction as though the crime had not been committed, under Pennsylvania law vesting discretionary authority to fix the penalty at either death or life imprisonment in cases of murder in the first degree, the highest court of Pennsylvania could, without interference by the federal courts, decide what

evidence, if any, the jury might consider in its choice of punishment. Commonwealth *ex rel.* Cannon v. Maroney, 419 Pa. 461 (1965); U.S. *ex rel.* Cannon v. Maroney, 255 F.S. 235, (W.D. Pa. 1966); U.S. *ex rel.* Cannon v. Maroney, 373 F.2d 908 (Third Circuit, 1967).

As this brief legal history of a single issue graphically illustrates, attempting to define and delimit the effects of the almost unrestricted pardoning power is rather like wrestling with an octopus; it seems as though there are always more arms. Especially in cases of second offenders whose previous convictions have been pardoned, we cannot overlook the likelihood that our observations and those of the courts are colored by a lack of sympathy for such men. Attempting to approach the problem rationally, with a view to practice, however, it would seem that the Commonwealth v. Smith and the Commonwealth v. Cannon decisions separating the admissibility of pardoned previous convictions with regard to conviction and sentencing offer the most reasonable view that can be hoped for under the circumstances, despite the fact that they tend to undermine both the effect of a pardon and court rules against hearsay evidence. The wisdom of the alternative, the previous rule that a pardon "blots out guilt" absolutely, was being questioned even when it was unanimously held to be in force. This is not, we would argue, a function of the pardon -- which should forgive the crime and remit the punishment, even as it affirms the validity of the conviction and the sentence imposed by the court -- but of amnesty in its original and obsolete sense of "amnesia", society's decision to utterly obliterate the memory of the offense. This is not to say, however, that there are no cases

in which the governor and the Board of Pardons should order complete expungement of a convict's record; such cases will be discussed in a later chapter.

As previously noted, Pennsylvania caselaw holds that a pardon restores the recipient's competency as a witness, while his credibility remains for the jury to determine. Under the Act of May 31, 1860, P.L. 382, all such civil rights were automatically restored except to second offenders and those convicted of perjury. When this provision was repealed under the new penal code (Act of June 24, 1939, P.L. 872, Section 1201), the function of the restoration of rights did not, as might be assumed, revert to the pardoning power. In order for restrictions to be lifted, they must first be imposed; at present, Pennsylvania law imposes very few. Those civil rights formerly denied a convict -- such as the right to vote, to hold office, to serve on a jury, to be a witness, etc. -- they now lose only while incarcerated, and that not because of their primary status as convicted criminals, but because while in institutions they are unable to establish the legal residence required.

Those privileges which are lost not even a full pardon can, of itself, restore. Where public office has been forfeited by a conviction, for example, a subsequent pardon cannot restore the recipient to his former office any more than would his release from prison. Further, a pardon does not restore the right to practice a profession or the right to a license which was revoked; nor can a promise of restoration of such rights or licenses on the

condition that a pardon be obtained be considered legally binding on the professional body or licensing agency making it, even if the pardon is, in fact, subsequently granted. 67 C.J.S., *Pardons*, Section 11 (1950); Wolfe's Disbarment, 288 Pa. St. 331, 135 A. 732, 50 A.L.R. 380.

In divorce proceedings, a pardon does not destroy the statutory grounds for divorce brought about by a crime involving moral turpitude unless the pardon is granted before divorce proceedings are begun. Davidson v. Davidson, 23 Dist. 578 (Pa., 1912). A pardoned offense also constitutes grounds for revocation of parole or a suspended sentence. Opinion Attorney General, 27 Dist. 830 (Pa. 1918). An offender may be denied naturalization or found ineligible for military service without regard to whether or not his conviction has been pardoned. Finally, as previously noted, a pardon is without effect with regard to second offender statutes and in all cases where the vested rights of third parties have intervened.

Although formal irregularities will not annul the effect of a pardon (Hester v. Commonwealth, *supra*.) in order for it to be held valid, it must be able to be shown that the pardon was intended to cover and does cover the offense for which the defendant was convicted. Hoffman v. Coster, *supra*. Therefore, a pardon applies only to the offense specifically mentioned therein and only to the recipient to whom it has been issued; it has no effect on accomplices or anyone else but the recipient. Commonwealth v. House, 10 Pa. Superior Ct., 259 (1899). In this case, the court also noted that under statutes making accessories principals, an accessory to a crime may be convicted even though

the principal has been pardoned. A pardon does grant, of course, immunity from prosecution and thereby denies a pardoned witness the right to refuse to testify on grounds of self-incrimination. See: *Brown v. Walker, supra.*, and *Commonwealth ex rel. Magilner v. Hamburg Magistrate, et al.*,

So far in this discussion we have attempted to limit ourselves primarily to the effects of an unconditional pardon. Noting the customary practice of the Board of Pardons of considering only applications "by persons not presently serving any prison sentence" and the principle of law that a pardon may be granted "as long as any legal consequences of the offense remain", we find virtually no point of confluence between the two spheres. To emphasize, in Pennsylvania it is scarcely possible for a case to exist in which an applicant for a pardon has a demonstrable legal need of one. We will consider the implications of this fact in a later chapter under "Recommendations".

The Board of Pardons is not, of course, restricted to recommending unconditional pardons, nor the governor to granting them. There are also the conditional pardon and its offspring, commutation. A pardon granted on conditions precedent becomes unconditional upon fulfillment of the conditions by the recipient; if the conditions remain unfulfilled, the pardon never takes effect at all. If it is granted on conditions subsequent, its effects remain the same as those of an absolute pardon as long as the conditions are not violated. *Commonwealth v. Hatsfield, supra.*; *Flavell's Case, supra.*;

Commonwealth v. Haggerty, *supra.*; Commonwealth *ex rel.* Stewart v. Allegheny Cty., *supra.* Conditional pardons represent the point at which the institution of pardon expanded to fulfill new needs and purposes. Whereas originally the pardon was full and unconditional and granted on a purely personal basis as a matter of grace, mercy or favor by the monarch or chief magistrate of a state or nation, the conditional pardon and its offspring, commutation and parole, are devices of a more advanced penology aimed at the gradual reestablishment of convicts within the society.

Because the conditional pardon is actually the historical forerunner and legal source of parole and commutation of sentences, it is often difficult to distinguish between them. Like a pardon, commutation and parole have been held to be acts of grace to which there can be no right on any ground. Commonwealth *ex rel.* Myers v. Shearer, 7 D. & C. 152 (1926); U.S. *ex rel.* Bogish v. Tees 211 F.2d 69 (1954). Commutation derives from the power to pardon conditionally in the sense that it is a release from punishment on the condition that the recipient voluntarily accept a lesser punishment. Additional conditions can also be imposed; consequently, the commutation itself may be conditional or unconditional. In *re Salvaggio*, 21 Som. L.J. 73 (1960). Parole, of course, is by its nature a conditional form of release.

The decision of the court in Commonwealth *ex rel.* Banks v. Caine, *supra.*, stated that "When our present constitution (of 1874) was adopted, parole as a penological expedient was unknown to American jurists and legislators and 'commutation' was then generally understood as meaning a reduction in the

length of sentence, effecting a discharge of the prisoner without any further supervision over him by the state authorities." The court then defined parole as distinct from pardons and commutations: "A parole ... does not obliterate the crime or forgive the offender. It is not an act of clemency but a penological measure for the disciplinary treatment of prisoners who seem capable of rehabilitation outside prison walls. It does not set aside or affect the sentence; the convict remains in the legal custody of the state." It was concluded that therefore parole cannot be equated with commutation and that the power of the governor to grant conditional pardons and commutations remains unimpaired by -- and is not in conflict with -- the act establishing parole. Justice Drew, dissenting, argued that he could see no distinction between commutation and parole and that, therefore, the power of executive clemency was in fact being infringed on by the act establishing parole. While it is true that commutation can be made identical to parole, even to the extent of requiring supervision of the recipient by parole authorities, its distinction lies in the fact that it can also be made quite different. Like pardons, commutation may be granted at any time and on conditions which would be illegal under the parole statutes -- conditions which may run far beyond the term of sentence to which parole supervision is limited. Finally, commutation differs from a full or conditional pardon in that it merely reduces the length or condition of punishment and does not imply forgiveness of the crime. In *re Salvaggio, supra*.

Summary

The power of the legislature and the courts to grant clemency themselves and their power to restrict its exercise by the executive are both severely limited. They can, however, through improvements in the laws and sentencing,

very nearly eliminate the need for it. At present, the pardoning power may be exercised for the benefit of any offender at any time and under any conditions, but its legal effect on an offender who has completed his sentence is virtually nil. Its effect at that time is purely one of "clearing the record" or of extending the state's forgiveness to a convict who has since become a law-abiding citizen. Also, a pardon cannot remit costs, nor can fines and forfeitures or anything else be removed through clemency once they have become vested in individuals.

With reference to commutation of sentence, the laws existing at the time of the constitutional amendment in 1874 made no provisions for parole of a sentenced prisoner, thus the only way a person could be released prior to the service of his sentence was by an act of clemency commuting his sentence to a lesser period, usually to time served and releasing him immediately. Since then, however, laws have established a parole process and a vehicle for determining an offender's readiness for release on parole. Unfortunately, the laws currently stipulate a minimum sentence that must be served before the parole process may operate.

As developed in Chapter III it is clear that the Board of Pardons is being asked to perform a parole function in reference to parole eligibility. It is the minimum term requirement for parole eligibility that distorts the issue of commutation. As we shall explain, for many reasons other than concern with the clemency function the intolerable minimum term provision requires statutory change.

Because the Board of Pardons now deals with minimum terms, it incorrectly appears that minimum term reductions are a clemency function, but actually they are not. With the rectification of the parole laws in this regard, or merely contemplating such change, it would be more clearly seen that the Board of Pardons in these activities is not exercising a proper clemency function. With statutory restrictions on the paroling authority removed, the need for commutation of sentence will still exist as long as inequities in sentencing are possible and do prevail.

The correction of inequitable or unjust sentences is the proper function of commutation. Such inequities or injustices can result from a variety of circumstances, including prejudicial attitudes of judges, plea bargaining, and changes in laws reducing the penalties for given offenses. An example of the latter is the change in some states wherein the possession of marijuana was a felony, punishable by a heavy sentence, and has since been reduced to a misdemeanor with a greatly reduced penalty. Commutation of sentence is a proper redress for those sentenced under the older and harsher law.

III. PARDONING PROCEDURES AND PRACTICES IN PENNSYLVANIA

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Before the establishment of the Board of Pardons by constitutional amendment in 1874, governors of Pennsylvania, like those of most states, heard pardon applications on behalf of convicts from every conceivable source and disposed of them as they saw fit. Governor Geary once confided to a friend that he sometimes heard twenty-five pardon applications a day. At the 1873 Constitutional Convention, former Governor Curtin expressed the hope that the creation of a board of executive officers to screen pardon applications would relieve the Governor of the pressure of the constant solicitations he received daily and of the badgering he encountered whenever he exposed himself in public. In an 1866 book on the subject, former Ohio Governor George Hoadly was even more explicit in his complaints: "As the work is now done, the pardoning business is carried on mainly by ear-wiggling. At the Governor's office, at his residence, on the streets, in the cars, at the theater, in church -- everywhere the work of solicitation proceeds. His family physician is enlisted and takes advantage of a visit caused by a slight illness of the Governor to tell him how much he has become interested in the fate of young so-and-so, whose lawyer handled his case so badly. The Governor's pastor calls on him with a tale of how a most interesting but unfortunate young man from Brother Somebody-else's church has been convicted of perjury. And, if Mrs. Governor can only be enlisted, then the friends of the prisoner are sure of success; while all the Governor is certain of is that his sense of duty and love for his wife are exposed to collision."

Today, however, the procedures for hearing and granting applications for executive clemency have been largely regularized, statutes have virtually eliminated the loss of civil rights resulting from a conviction, and a parole process has been established to effect the selective release of offenders before the expiration of their sentence. These factors tend to reduce the need for, and the impact of, clemency, and in turn, the tendency to bring pressure to bear on the governor and members of the Board of Pardons.

Despite the factors which tend to reduce the need for clemency, there remains a significant need for the function of pardon and other forms of clemency which is quite distinct from parole. Parole is an integral part of the correctional system. This is evident not only from its common definition as service of a prison term outside prison walls, but also by its numerous contacts with the correctional institutions for information, its relation to good-time allowance, and its function of returning parolees to institutions in the event of violation of parole.

The function of clemency is quite different. Clemency is equally applicable to relieving the status of offenders who are entirely free of prison and parole, as well as inmates of institutions. Its function is to provide surcease from punishment in deserving cases, as well as to remedy disparity in sentences and other injustices. One illustration of the need for clemency is the reduction in penalties for possession of marijuana enacted in several legislatures in 1971 and 1972. When this happened it left in prison numerous convicted offenders serving sentences longer than could be imposed under the new laws. Where the parole laws of the state permit, the gross inequities resulting from this "double standard" can be addressed by the parole board

as it was in Florida where about 100 inmates received early paroles. This would not be possible in Pennsylvania without a clemency action to commute the minimum sentence to make the prisoner eligible for parole consideration.

Clemency, in its broad sense, is an act of mercy. As generally applied in the criminal justice field it includes the granting of a full pardon, with or without the total erasure of the conviction as though no crime had been committed, and it includes such other acts as reducing all or part of a sentence.

In its list of rules and its "Analysis of Action" charts accompanying its annual reports, the Board of Pardons indicates the following types of clemency on which it takes action:

- a. Commutation of death penalty to imprisonment for life. This is not an active category since the death penalty no longer exists in Pennsylvania.
- b. Commutation of minimum sentence to make applicant eligible for release after parole by the Board of Parole.
- c. Commutation of life sentence to make applicant eligible for release after parole by the Board of Parole.
- d. Commutation of maximum sentence of applicants now on parole. This type of clemency may be initiated by the individual on parole, or by the Board of Parole. Either way, its purpose and effect is to discharge a parolee from further obligation under the sentence imposed.
- e. Pardon from the offense for which convicted. This type of clemency is reserved, by practice, for those offenders who are not presently serving any prison sentence, including those who never received a prison sentence and those previously released on parole.

Another type of clemency listed is remission of fines and forfeitures.

However, no actual applications for this type of clemency have been

reported for the past several years, and whatever activity has taken place in this regard has been initiated administratively as a means of clearing the records of county clerks after they have amassed a volume of uncollectable fines and forfeitures.

Clemency decisions rendered in Pennsylvania should be viewed in light of the primary function of clemency to provide surcease from punishment in deserving cases. Perhaps clemency would not be needed if all laws were just and could be perfectly adapted to every conceivable situation. Such an ideal condition does not, and is not likely to, exist and the clemency function is needed to correct individual situations not equitably handled within the more rigid framework of law and the justice system. Further, clemency is needed to bridge the gap between social, economic, and political changes and changes in law and practice.

For several years the bulk of clemency actions in Pennsylvania have involved the correction of individual situations which would better be corrected by changes in the laws and practices. The above listing of types of clemency actions in Pennsylvania should reveal even to the casual reader that the clemency functions are closely related to, if not duplicative of, parole functions. With the death penalty not existent, there are four major types of clemency, three of which are devoted to compensating for laws that prevent the timely and proper functioning of the Board of Parole. Such "clemency" mollified some of the disability occasioned by inadequate laws. At the same time this has detracted from the urgent need to change the laws, has made clemency largely an adjunct of parole, and has impeded the full and proper development of the clemency function.

From Table I it can be seen that nearly half (48.6%) of all cases heard by the Board of Pardons over the six-year period 1967 thru 1972 were for the purpose of commuting the minimum terms to make prisoners eligible to be considered for release by the paroling authority. Another 29% of the clemency hearings in this period concerned commutation of life sentences for parole eligibility purposes, and still another 3.4% of the cases heard were for commutation of maximum terms in order to discharge a parolee from further parole supervision.

Thus, fully 81% of the hearings conducted by the Board of Pardons during the six-year period concerned pardons, an appropriate function of clemency but constituting only 18.7% of the hearings held.

TABLE I

Types of Clemency Cases Heard by the Pa.
Board of Pardons, 1967 through 1972, by
Number of Hearings and Per Cent of Total

<u>Type of Clemency</u>	<u>No. of Hearings</u>	<u>% of Total</u>
All Types	2,082	100.0%
Commutation of Minimum Terms	1,012	48.6%
Commutation of Life Terms	608	29.2%
Commutation of Maximum Terms	72	3.4%
Pardon	390	18.7%

Not included in Table I are eighty-one cases for commutation of maximum terms initiated by the Board of Parole on behalf of parolees whom the Board of Parole felt were suitable for discharge from further parole supervision.

These cases were acted upon by the Board of Pardons in 1972. They were omitted from the table because they did not constitute hearings. How this kind of case is dealt with is set forth later in this chapter under Applications and Hearings.

Table II is a compilation of the decisions made by the Board of Pardons on the cases heard during the period 1967 through 1972. The type of clemency receiving the most favorable recommendations by the Board of Pardons is the pardon. Commutation of minimum terms constituted the largest single type of clemency and received the lowest per cent of favorable actions by the Board of Pardons.

TABLE II

Annual Hearings Conducted by the Board of Pardons
1967 through 1972, by Type of Clemency Action, Number of Hearings,
and Per Cent Receiving Favorable Recommendation to the Governor

YEAR	<u>MINIMUM TERM</u> <u>COMMUTATION</u>		<u>LIFE TERM</u> <u>COMMUTATION</u>		<u>MAXIMUM TERM</u> <u>COMMUTATION</u>		<u>PARDON</u>	
	<u>No. of</u> <u>Hearings</u>	<u>%</u> <u>Granted</u>	<u>No. of</u> <u>Hearings</u>	<u>%</u> <u>Granted</u>	<u>No. of</u> <u>Hearings</u>	<u>%</u> <u>Granted</u>	<u>No. of</u> <u>Hearings</u>	<u>%</u> <u>Granted</u>
1967	183	7.1%	99	25.0%	18	11.1%	57	47.3%
1968	135	6.6%	82	25.6%	14	28.5%	51	50.9%
1969	134	7.4%	81	20.9%	8	0.0%	74	62.1%
1970	161	6.8%	101	30.6%	6	33.3%	59	62.7%
1971	241	19.5%	123	39.0%	20	25.0%	71	57.7%
1972	158	20.8%	122	41.8%	6	0.0%	78	57.6%
TOTAL	1,012	12.1%	608	31.7%	72	18.0%	390	56.9%

The governor is powerless to act on clemency matters without a favorable recommendation forwarded to him from the Board of Pardons. As can be seen from Table II, the decisions of the Board of Pardons in those types of clemency more properly belonging to the paroling authority receive a high

percentage of denials. There is some evidence, however, based on the decisions made in 1971 and 1972 that denials of commutation of minimum and life terms are going down. Even so, approximately 80% of the minimum term commutation cases were denied in each of these two years.

Over the six-year period covered in Table II, the Board of Pardons recommended only 123 prisoners for commutation of minimum terms. On its face, this low number of favorable recommendations suggests extreme caution on the part of the Board of Pardons. A favorable recommendation need not be equated to a decision to release the applicant from confinement. For all practical purposes, however, the Board of Pardons views it in this light since it requires the Board of Parole to hear such cases as soon as possible following the commutation, and requires a statement of justification for the Board of Parole's denial of parole. The Board of Pardons may then order release on parole if not satisfied with the justification given by the Board of Parole. This procedure needlessly confuses the parole and clemency function and results in extremely limited favorable recommendations for commutation by the Board of Pardons.

A further confusion of the roles of clemency and parole results from the failure of Pennsylvania statutes to empower the paroling authority to discharge a parolee from supervision prior to the attainment of the maximum term. To compensate for inadequate law the practice in effect during 1972 allowed the paroling authority to submit a list of parolees whom it felt could be safely discharged from parole and request that the maximum terms for these parolees be commuted. Eighty-one such cases were considered by the Board of Pardons in 1972, and a favorable recommendation was sent to the governor on seventy-one of them.

Noticably absent from the clemency actions heard by the Board of Pardons were cases involving outright release from further confinement by a pardon or commutation to time already served, cases specifically based on disparate or unjust sentences, and cases involving sentence under a more stringent law that has subsequently been modified or eliminated.

It is evident that most of the functions performed currently by the Board of Pardons are nearly identical to that which a parole board would normally perform if the statutes did not place time restrictions on parole eligibility. It is also evident that the Board of Pardons is exercising clemency functions on a less than minimal level, and recommendations to change this to restore a proper degree of its use of clemency are contained in Chapter IV.

Applications and Hearings

In the first part of this chapter we have set forth the statistical record of clemency hearings by the Board of Pardons and what dispositions it made. In this section is presented the methods and techniques used by the Board in conducting its business. For purposes of clarity and convenience, the following material generally follows the outline used in setting forth the official rules of the Board of Pardons.

"All applications must be made on forms prescribed by the Board. Such forms may be obtained from the Secretary of the Board at a charge of \$2.00 per set." (Rule 20). "Applications must be filed with the Secretary...and may be filed at any time. An original and ten copies of the application must be filed..." (Rule 21). "...a filing fee of \$15.00 will be charged. Such a fee must accompany the application and is not refundable." (Rule 22).

The special form required for applications to the Board of Pardons consists of a list of questions including such basic data as date and place of birth, the applicant's version of the crime or crimes for which he is requesting clemency, and his prospects for employment should his petition be granted and result in his release. The information required by this form is included in a facsimile in Appendix A. Its contents are further discussed in this study under "Recommendations".

In addition to the \$2.00 charge for forms and the \$15.00 filing fee, a \$5.00 fee is charged for the re-hearing of an application. (Rule 62). The Board of Pardons realizes an income averaging slightly more than \$10,000 a year from the imposition of these fees. If an applicant is unable to pay the fee, he may swear out a pauper's affidavit enabling him to apply without charge. Pennsylvania is the only state which imposes such fees as part of the clemency process.

The Board of Pardons employs a clerical and administrative staff on a full-time basis to aid in the processing of applications. This staff is presently comprised of an Administrative Assistant 2, a Clerk Typist 2, a Clerk Steno 3, and the Secretary of the Board of Pardons, an Administrative Officer 5. These positions are all appointed, and are not subject to the State Merit System employed for civil service occupations. The Secretary of the Board of Pardons oversees the processing of each application. In *Commonwealth v. Vladyka*, Pa. 282 A.2d 393 (1971), it was held that the Secretary has a discretionary power to refuse to process an application if, in his judgment, it has not been properly filed. Communications addressed to the Board are generally forwarded

or referred to the Secretary, who responds to them in the Board's name. The current Secretary is Mr. Gerald A. Gillingham, who holds an M.S.W. degree and has a background in social work and administration.

Once an application has been completed and properly filed, copies are sent to the court, to the district attorney of the county from which the applicant was sentenced, and to the correctional institution in which he has been confined, "in order to obtain expressions of opinion as to the merits of the application". (Rule 23). A copy is also sent to the Board of Probation and Parole which subsequently conducts a fact investigation of the case. Investigators preparing such reports are specifically advised against including value judgments or recommendations.

The basic outline used by Parole Board investigators is included in Appendix B. Briefly, the investigator attempts to provide the Board of Pardons with a profile of the applicant with special emphasis on his financial status and reputation in the community. Parole agents also interview police, the presiding judge and the district attorney in order to obtain the official version of the facts of the crime, information on parole violations, other indictments and outstanding fines, and the comments of those involved in trying the case.

Information generally returned by the Bureau of Correction includes virtually all data available on the applicant. Periodic classification summaries designed to determine the prisoner's qualifications for rehabilitative programs and to identify individuals of potential danger to the inmate community are attached along with a special commutation summary comprised of much of the

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same data. A listing of the information generally included in such summaries can be found in Appendix C. The Board of Pardons frequently requests special psychiatric evaluations of applicants for commutation, and these, too, are made and forwarded by the Bureau of Correction. Finally, institution staff members familiar with the applicant are asked to make recommendations. (Sample summaries are also included in Appendix C.) In addition, the Pennsylvania State Police provides the Board with a complete listing of the applicant's prior criminal record, if any.

Rule 91 reads: "The Secretary of the Board shall include with copies to the court and district attorney requests for information and advice from the judge who tried and sentenced the applicant, from the district attorney or assistant district attorney who prosecuted the applicant, and from the district attorney in office at the date of the application in accordance with the Act of April 24, 1931, Pl. 71, 71 Ps. Section 299a." The wording of this rule is somewhat ambiguous in that it implies that the Board of Pardons is statutorily required to seek the opinions of judges and prosecuting attorneys when, in fact, this is not the case. The act cited is not binding on the Board and does not pretend to be; it merely states that "it shall be the duty" of such officers of the court to comply promptly with requests from the Board for information and advice. As previously noted, these opinions are actively sought by the Board, both directly and through field agents of the Board of Probation and Parole.

When the investigation is considered complete, the case is listed on the calendar of the Board of Pardons and the applicant or his representative is notified of the time and place of the hearing. (Rule 30). At least one week prior to the

hearing, the Secretary of the Board of Pardons must "cause to be published in a newspaper of general circulation in each county where an applicant committed the crime or crimes with respect to which he has applied for clemency a notice stating the true name of the applicant; any other names by which he is known; the crime or crimes with respect to which he has applied for clemency; the institution, if any, in which he is confined and the time and place of the public hearing at which his application will be heard." (Rule 93).

The Board of Pardons meets at least once a month except during the months of January, July and August. Additional sessions are regularly scheduled during months when the case load of the Board generally requires them. Sessions may be added or continued "upon due public notice". (See: Monthly Hearing Schedule in Board of Pardons Rules, Appendix D.) For each session, the Secretary of the Board prepares and has printed a calendar listing the cases to be heard by the Board at that session. Copies of the calendar are sent to the applicant or his representative; to the district attorney of the county from which the applicant was sentenced; to the Commissioner of Correction; and to the Board of Probation and Parole. The Board of Pardons staff also prepares a summary of each file for use by members of the Board at the hearings. These include: brief synopses of the official and applicant's versions of the offense, the date and term of sentence, the age of the applicant, the nature of the application, his previous criminal record (if any), the institution to which he is confined (if any), a brief synopsis of his institutional record, and the recommendations of the staff, the names and recommendations of the trial judge, court and the district attorney, the county in which he was convicted, and the name of his representative. These sheets are used by the Board for quick reference during hearings, though they have at hand, and frequently refer to, the complete file on the applicant.

If not confined, an applicant must appear personally before the Board unless he is expressly excused from doing so; if confined, he may designate "any other person" to appear on his behalf. Whether confined or not, applicants may -- but are not required to -- retain legal counsel to advise and represent them. Only attorneys entitled to practice before the Board may charge or accept fees. (Rule 40). Practically any attorney in good standing may be admitted, but only on the understanding that the amount of fees paid to him for representation of an applicant may be inquired into and regulated by the Board; if an attorney refuses to comply with a direction from the Board that his fee be reduced, he is subsequently barred from practice before the Board. (Rule 41).

An exception is made of those attorneys who in any way participated in the prosecution of the applicant; they are specifically contraindicated from accepting fees as applicants' representatives, though they may appear in this or any other capacity without charge.

The majority of those petitioning for pardon retain attorneys as their representatives. Those who do not are represented by clergymen or by members of their families or appear as their own representatives. Those recommended for special commutation of their maximum sentences by the Parole Board do not appear and are not represented, since no hearing as such is conducted in these cases; at the end of each session, the Chairman of the Board of Pardons simply reads their names aloud and asks if anyone present wishes to object to their being granted commutation. Those applicants who are incarcerated and therefore

may not appear are sometimes represented by attorneys and less often by clergymen. A majority, however, receive their representation from the office of Pardons Case Specialist William Berg. This last group of representatives is comprised of institutional counselors selected and trained by Mr. Berg for this assignment. Whether or not they have interviewed the inmate they are representing appears to be dependent on whether or not they happen to work in the institution in which he is confined. In addition to their duties as representatives before the Pardon Board, all continue to carry counseling caseloads and although these are somewhat reduced, those interviewed stated that they generally have little time to prepare. When they appear, their function seems generally limited to reading a synopsis of the recommendations of institutional staff, to introducing such witnesses as may have appeared on the applicant's behalf, and occasionally responding to questions from the Board about their "feelings" in a particular case.

As a part of this study NCCD conducted a survey of those denied pardons and commutation of minimum sentences during the calendar period September through December, 1972. The collated results of this survey are listed in Appendices E and F. Two questions relating to representation in the survey of those denied commutation of minimum sentences, however, are of interest here. Twelve of those in our sample were represented by private attorneys, twenty-seven by representatives from the Pardons Case Specialist Office and five by clergymen; two had no idea who, if anyone, had represented them at the hearings. Eleven of those represented by Pardons Case Specialists knew the name of the person who had represented them; sixteen did not and of those several seemed in doubt as to what a Pardons Case Specialist was or what his

qualifications might be. Those who did not know who represented them were probably, of course, also represented by Pardons Case Specialists.

It had been the general impression of NCCD consultants who observed Pardon Board hearings that the members of the Board had shown themselves to be substantially impressed by the quality of representation. As a check against this, we compared the representation of those granted commutation during the same calendar period in order to determine the success rates of the various categories of representatives. Attorneys achieved a fifty per cent success rate with twelve representing those whose petitions had been granted and twelve those denied. In contrast, Pardons Case Specialists succeeded in seven cases out of thirty-four for a rate of just over twenty per cent. None of those granted commutation during this period were represented by clergymen. These figures speak for themselves since it is extremely unlikely that such a divergence of outcome could have been produced entirely by other factors. Clearly, the Board is significantly impressed when a case is well-prepared and cogently argued and just as significantly unimpressed by low-quality, non-professional representation.

Another question asked those denied commutation was whether or not they thought they had been adequately represented at the hearing. Overall, twenty-four said yes, twelve no, and the remaining ten said they didn't know. The bulk of those giving the last response (8) were represented by Pardons Case Specialists. A typical response: "I don't know because I was not there." Those represented by attorneys -- and, ironically, also by clergymen -- generally expressed confidence in their representatives. Several of those represented by Pardons

Case Specialists who did so indicated that this feeling resulted from the fact that the counselors assigned them had appeared interested in their cases -- that is, that they had assumed the stance of advocates rather than dispassionately "presenting" the cases assigned to them.

Board of Pardons hearings are held in the Supreme Court rooms located in the State Capitol Building in Harrisburg, in City Hall in Philadelphia, and in the City-County Building in Pittsburgh. These are large, impressive rooms whose most striking characteristics in common are their incredibly poor acoustics and their resemblance to cathedrals. By constitutional provision, hearings of the Board of Pardons are open to the public. They are generally, however, attended only by interested parties and their representatives.

Cases are called by the Chairman of the Board of Pardons in the order in which they appear on the calendar unless a special request has been made beforehand for a change for the convenience of an attorney, prosecutor, or other individual. If there is no answer when a case is called, it is passed temporarily and called again after all other cases have been heard. The applications of those who fail to appear are automatically stricken from the list. They may be reinstated upon petition by the applicant or his representative and the payment of a \$5.00 fee. (Rules 82 and 83).

When a case is called, the applicant or his representative steps forward and makes a statement on behalf of the petition and is then cross-examined by members of the Board. Any witnesses who wish to appear also step forward and they, too, are cross-examined. At the sessions attended by NCCD consultants,

questioning was most often initiated by the Lieutenant Governor or the medical member, Dr. Biele. Dr. Biele tends mostly to ask questions aimed at determining the accuracy of the conclusions of the often spotty psychiatric evaluations at his disposal. Lieutenant Governor Kline's questions seem to aim more at understanding how the applicant will be received at home and in his community should the Board decide to release him. Board members generally seem inclined to discuss, if not retry, cases -- particularly if the petitioner alleges that he was innocent of the crime of which he was convicted. Each case, however, is different and each is handled individually, making real trends in decision-making or even questioning difficult to identify. Appendix G to this study presents, insofar as is possible, an analysis of cases heard, granted, and denied during the 1972 calendar year.

Immediately after adjournment of the open hearings, the Board retires to a private meeting room to discuss and vote on the cases heard. Again, the Chairman announces the cases in the order in which they were heard and generally offers his vote and the reasons for it at the same time. The discussions which follow are informal and generally brief. In about half the cases the vote of the members is unanimous one way or the other and there is little or no discussion. Those cases which received greater attention were usually homicides or sexual offenses -- cases in which the mental health of the applicant was subject to some question -- or those in which some special circumstance obtained. Most of these were ultimately either denied or held under advisement pending a more thorough psychiatric evaluation.

Reasons given by Board members for voting "no" on an application varied, but some generalizations can be made. In pardon cases the question was often raised whether or not the applicant "needed" a pardon. Board members often expressed the opinion that those applying for commutation of their minimum sentences "should serve more time" or had received "a proper minimum". The Board tends to support this view by noting the extent of an applicant's criminal record or the circumstances of the crime, particularly if weapons were involved. In homicide and manslaughter cases especially, particular concern is expressed if the applicant does not appear to have internalized the fact that he has been convicted of taking a human life.

There is no discussion in executive sessions of what reasons to give to the Governor in recommending that a petition be granted. Presumably, the recommendations of institutional staff and such reasons as have been expressed by members of the Board are abstracted and prepared by the Secretary of the Board of Pardons and later signed by those members favorably disposed toward an application. If a member wishes to dissent from a favorable recommendation, he prepares a letter explaining the reasons for his disagreement and sends it to the Secretary who forwards it to the Governor. All applications are then further screened by one of the Governor's legal aides -- at present Mr. Lawrence Beaser -- who then, presumably, includes his own recommendations. This last step is not a part of the constitutional clemency process. In 1972 the Governor denied two of thirty-three recommended petitions for commutation of minimum sentence, one of fifty-one petitions for commutation of life sentence, and four of seventy-one special commutations of maximum sentences, the last recommended by both the Board of Pardons and the Board of Parole.

When a petition is denied, whether by the Board of Pardons or by the Governor, the duty of notifying the applicant or his representative is left to the Secretary of the Board of Pardons. Notification consists of a brief form letter to the representative over the Secretary's signature. A facsimile is included in Appendix H. As can be seen in the responses to Question 6 of our survey of those denied commutation of minimum sentences (Appendix E), the methods for notifying incarcerated applicants are variable. In some cases, notification delivered verbally by institution officials is so informal that applicants continue to await some official written notice or explanation from the Board of Pardons. Those who make such requests for the reasons for denial receive another brief form letter informing them that the Board is not required to give reasons for the action of refusal. A facsimile of this letter is included in Appendix H.

Those ultimately granted clemency receive a certificate entitled either "Charter of Pardon" or "Warrant of Commutation", depending upon the nature of the grant. These are prepared by the Secretary of the Board of Pardons, are signed by the Governor and those members of the Board who voted favorably and each is attested to by the Secretary of the Commonwealth who affixes the official seal of the Commonwealth to the document. Announcement of the grant is made public by the Secretary of the Board of Pardons, and the Board's reasons for making a favorable recommendation are filed at the office of the Board in Harrisburg, with the Lieutenant Governor, and with the Assembly, in accordance with the provisions of the Constitution.

Recommendations with respect to procedures and practices are contained in Chapter IV.

IV. ANALYSIS AND RECOMMENDATIONS

IV. ANALYSIS AND RECOMMENDATIONS

The section which follows divides itself naturally into two parts: Long-term Recommendations and Recommendations for Procedural Change. The first part consists of recommendations requiring legislative action or constitutional revision. The recommendations for procedural change are those which can be brought about solely by the authority of the Board of Pardons and the Governor. In addition, this section offers recommendations for a few changes within the power of the Board and the Governor which, while they would be ill-advised as permanent features of the clemency process, are designed to help bring about the long-term goals.

Long-Term Recommendations

1. The Pennsylvania Penal Code should be revised to:
 - a. Eliminate the requirement that minimum terms be served before parole eligibility.
 - b. Eliminate restrictions on parole eligibility for those serving life sentences.
 - c. Provide authority for the Board of Parole to make a final order of discharge and issue a certificate of discharge to deserving parolees before the expiration of their maximum term.

NCCD opposes the imposition of minimum sentences as a general principle because this practice inevitably results in both inequities in sentencing and conflicts in the administration of rehabilitation programs. In Pennsylvania, one result has been to cause the Board of Pardons to act as a kind of super parole authority with the power to commute minimum sentences.

It is, however, only a secondary consequence; the primary result has been the impediment of parole and rehabilitative processes because minimum terms deprive the Board of Probation and Parole of the discretionary authority necessary if prisoners are to be released at the optimal time and under the proper conditions. Though at first glance it might appear to make little difference whether a prisoner deemed worthy of parole before the expiration of his minimum sentence is released after being granted commutation or purely at the discretion of the Board of Probation and Parole, the effects of this distinction should not be underestimated. Release on parole is a regular part of the correctional system, while the exercise of executive clemency is --or should be -- an extraordinary action whose implications, as we have previously implied, can extend far beyond its actual legal effects. Where commutation is built into the system as a means of correcting excessive minimum sentences, one implication among many is that the Parole Board cannot be trusted to exercise its authority to release prisoners from incarceration with any degree of responsibility. If this is in fact the case, the proper solution lies not in restricting the Parole Board but in staffing it with men whose judgment will not be so subject to question.

Thus, even within the relatively narrow scope of this study, ample reasons can be found for a hard, thoughtful look at the practice of imposing minimum sentences on convicted offenders. As our primary long-term recommendation, we therefore submit for review by appropriate authorities in the government of the Commonwealth the *Model Sentencing Act* drafted by the Council of Judges of the National Council on Crime and Delinquency, with particular attention to the elimination of such minimum terms. The complete text of the act, with accompanying commentary, is reprinted in Appendix I.

As an interim measure only, we recommend that commutation of minimum sentences be placed in the same category as the so-called "special" commutation of maximum sentences cases. That is, the Board of Probation and Parole should recommend on its own initiative, that selected offenders be made eligible for parole through commutation of their minimum sentences. At the same time, the Board of Pardons would, of course, continue to hear applications from individual inmates, but it is expected that the volume of such applications would be greatly reduced.

To implement this procedure the Board of Parole should establish policies and procedures for routinely reviewing every prisoner within the first year of his imprisonment as though he were eligible for release on parole, recommending commutation of minimum term on those whom it would grant parole, and establishing a subsequent hearing for those whom it would deny parole at this time.

This recommendation is not made lightly, nor do we make it without considerable reservations. Our primary source of concern is the fear that the legislature might choose not to act or that for any of a variety of other reasons it might be adopted as standard operating procedure rather than as a interim measure as the recommendation intends. The decision of the court in *Com. ex rel. Lycett v. Ashe*, 145 Pa. Super. 26, 20 A.2d 881 (1941), that the statute defining the method of computing minimum and maximum sentences did not affect the right of prison authorities to recommend commutation, presumably also covers such recommendations by the Board of Probation and Parole. Further, no conceivable

legal means exist to constrain the Board of Pardons from soliciting recommendations or advice from any quarter. However, even though the procedure is legally unassailable and leaves the substance of the law unchanged, its effect is still to circumvent and undermine the law. Such practice, notwithstanding the repugnance of the law and its consequences, cannot be advised with any great enthusiasm.

Further, while to institute this procedure as an interim measure would not, we feel, cause any irreparable harm, and would temporarily alleviate the damaging effects of minimum terms on rehabilitation processes, the consequences of its use as a long-term, institutionalized part of the Pennsylvania criminal justice system would likely be as serious as the defects of the law it superceded. The line between the extraordinary executive prerogatives of pardon and commutation and what should be the standard release procedure, parole, should be made as distinct as possible. Once the pardoning power becomes, operationally, simply a superior adjunct to the parole process, it loses its ability to review cases in light of special circumstances which may call for mitigation of punishment. This situation is not far from being realized in Pennsylvania at the time of this study and is likely to persist or grow more serious if present practices are continued or if the recommended interim arrangement with the Parole Board is institutionalized or continued for an indefinite period of time. We therefore most strongly urge the consideration of corrective legislation at the earliest possible time.

For the purposes of establishing parole eligibility consideration, life sentences should not be treated differently in the statutes from any other prison sentence. A prisoner sentenced to life in prison should be eligible

for parole consideration at any time after his admission to prison, and the matter of determining his suitability for release on parole left to the good judgement of the Board of Parole. (See Model Sentencing Act, Appendix I, page 26).

In its Standard Probation and Parole Act the National Council on Crime and Delinquency has provided for prisoners released on parole to be discharged from parole prior to the expiration of the maximum term of sentence as follows: "...When a prisoner on parole or conditional release has performed the obligations of his release for such time as shall satisfy the board that his final release is not incompatible with the best interest of society and the welfare of the individual, the board may make a final order of discharge and issue a certificate of discharge to the prisoner; but no such order of discharge shall be made in any case within a period of less than one year after the date of release except where the sentence expires earlier thereto..." This, or similar wording is recommended for Pennsylvania, and will eliminate the involvement of the Board of Pardons to commute the maximum term.

2. *The Board of Pardons should abjure involvement in pre-release decisions.*

Under present Pennsylvania law (Act of July 16, 1968, P.L. , No. 173, Section 2 as amended 1970, Dec. 2, P.L. , No 274, Section 1; 61 P.S. Section 1052), the Bureau of Correction is given full discretion and authority to release inmates before the expiration of their minimum sentences on furlough, community treatment study release and work release programs. The rationale behind this law is that these programs are rehabilitation procedures designed to ease the convict's eventual return to the community. There can be little doubt, therefore, that they

fall within the province of the Bureau of Correction, although a case might be made for the creation of an intermediate status which would affect the pre-releasee's transfer to supervision by the Board of Probation and Parole.

Apparently, however, judges have been quite critical of the arrangement and particularly of the fact that their opinions on whether or not prisoners should be released had not been requested. This, too, is as it should be. In most cases, neither judges nor district attorneys have so much as seen the offender since the day he was sentenced, rendering their opinions on correctional policy somewhat specious in contrast to conclusions drawn by the Bureau as a result of extended observation and testing.

Notwithstanding this fact, and the fact that the Bureau of Correction can legally release a prisoner under such a program without their approval, it is our understanding that the conflict was resolved by the promulgation of a "gentlemen's agreement" providing that the Board of Pardons review the arguments for and against the pre-release of an inmate and deliver a decision which would be final and binding upon all concerned. Such an arrangement is undesirable correctional practice at best; at worst, it may be unconstitutional. Judges should have no more right to be party to determinations of the relative rehabilitation of a convict than they have to alter his sentence after the term of the court has expired. In the words of Chief Justice John Marshall in *U.S. v. Wilson, supra.*: "It is a constituent part of the judicial system that the judge sees only with judicial eyes and knows nothing respecting any particular case of which he is not informed judicially." At most, their opinions under

such circumstances have the same weight as those of any private citizen and they have the same right to file suit or to protest the Bureau's action in an individual case as would a member of a jury which convicted the offender -- no more and no less.

The use of the Board of Pardons as a mediating body is less clearly extra-legal due to the somewhat hazy boundaries governing the Board's jurisdiction. The strict view, however, of the Board's constitutional charge to advise the Governor of favorable recommendations with regard to pardons and commutation of sentences would seem to imply that the Board of Pardons, too, was exceeding its authority.

Nevertheless, on February 20, 1973, the Judiciary Committee of the Pennsylvania Senate unanimously reported out a bill that would involve judges, district attorneys and even victims in the ultimate decision on an inmate's readiness for release. In essence, it simply formalizes the "gentlemen's agreement" already described. The bill, however, eliminates possible illegalities by leaving referral to the Board of Pardons to the discretion of the Commissioner of Correction and making the Board's response, favorable or unfavorable, non-binding. It does, however, require the Bureau of Correction to notify the district attorney and sentencing judge before allowing an inmate to participate in pre-release programs.

The ultimate disposition of this bill -- or of the two similar bills originating in the Assembly -- is unknown to us. If it is passed, however, we would strongly recommend that it be repealed.

3. *The Constitution of Pennsylvania should be amended along the lines of the Model State Constitution, Section 5.05, Executive Clemency, published by the National Municipal League, 47 E. 68 Street, New York, N. Y. 10021, and quoted here:*

"The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses and may delegate such powers, subject to such procedures as may be prescribed by law."

It is recognized that the above model recommended for adoption in Pennsylvania constitutes a major change in the existing provisions for the exercise of executive clemency. It would, in fact, disestablish the present Board of Pardons as a constitutional entity, and place with the governor the sole power to grant or deny clemency.

In our view, the present arrangement effectively vests the power of executive clemency in the Board of Pardons, giving the Governor no more than a veto over favorable decisions by the Board. We feel that this promotes a number of less than desirable tendencies. First, it makes the Board a separate entity from the Governor in the bureaucratic structure of the Commonwealth, with the result that the Board inclines toward expansion of its activities beyond the specific duties prescribed for it by the Constitution. Further, it tends to place the Governor in an adversary relationship to the Board, such that he may feel the need to have a counselor serve as a pardon attorney, adding needless complexity and delay to the clemency process.

Under the provisions of the recommended amendment, whatever resource selected by the governor to assist in clemency matters would be solely advisory rather than a check on his authority. It would restore to the office of the Governor some measure of its former dignity by making it the sole repository of the Commonwealth's collective expressions of mercy and forgiveness.

Recommendations For Procedural Change¹

1. Provide each new inmate admitted to state correctional institutions with a simple printed statement of his right to petition for commutation or pardon during the orientation period. A more comprehensive handbook should be prepared and supplied to all institutional counselors.

In the survey conducted by NCCD among inmates denied commutation of their minimum sentences (see Appendix E), applicants were asked how they learned that they could apply for commutation. In twenty-four responses the answer was "from other inmates". Attorneys, institutional counselors and other sources divided about evenly with eight, ten and eleven responses, respectively. In all cases, the quality of the information imparted was variable. Although there is no right

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For whatever body is going to hear clemency applications now, or in the future.

to clemency itself, the right of any offender to apply must be unquestioned and so, at the very least, every inmate admitted to a correctional institution must be considered a potential applicant for clemency.

The statement should probably be issued under the name of the Secretary of the Board of Pardons and should include in general terms information about the Board and the process of application and an explanation of the types of pardons and commutations available. Finally, the statement should include a paragraph or two explaining the purposes of clemency in such a way as to indicate to the inmate the prospects of his petition should he file one. The statement should close with a recommendation that he consult his institutional counselor for further information.

At the same time, each counselor should be provided with a more comprehensive book, designed to enable him to answer inmates' questions about clemency with some authority and to aid in filling out applications. In addition to substantially reducing the workload of the Board of Pardons office, this procedure would provide the inmate with personal contact in an area in which he must necessarily be unsure. The responses of applicants in the survey mentioned above indicated a great deal of variance in counselors' knowledge and understanding of both clemency and the procedures for applying it. Counselors should be better informed in order to eliminate some of the mystery and the rumor-mill potential which currently shrouds the clemency process within state correctional institutions.

2. *Review the application form, making it shorter and less complex.*

We have taken the liberty of drafting a revised application form and have included it with the present form in Appendix A. We intend this proposed revision as indicative of the direction change should take rather than as an absolute prescription for specific change since the Board and their Secretary best know what information is necessary for decision-making and administration. Still, it seems to us somewhat superfluous to require the applicant to provide information which the Board regularly receives or has access to through other sources (see Appendix C for a listing of information regularly supplied the Board by the Bureau of Correction and the Board of Probation and Parole.).

In addition, we recommend that the requirement that applicants furnish photographs of themselves be abolished. Those applicants not institutionalized are already required to appear in person before the Board; if the Board wishes to see institutionalized applicants, they should require their personal appearance also. We cannot see how snapshots or institutional mugshots, in some cases as much as fifteen years old, can be of any use to the Board in their deliberations. We do not question the right of the Board to make this requirement, but rather the advisability of their doing so.

3. *Eliminate the filing fee, the charge for application forms, the fees for re-filing and for re-hearing in the event of non-appearance and any and all other fees and charges associated with the clemency process.*

It is our opinion that even with the availability of the pauper's affidavit, the very existence of these fees results in discrimination against indigent applicants. The obvious intention of their imposition is to discourage frivolous applications or refilings; in fact, as our interviews with applicants denied pardons and commutations indicate, they have no such effect. On the other hand, they have the probable, though not measurable, effect of discouraging indigent applicants from applying at all. Furthermore, the income from these fees, averaging a little more than \$10,000 a year, is not such as to justify their existence on financial grounds. Experience would dictate the conclusion that the accounting cost on such a small sum would alone offset the income involved.

4. *Require that the person representing the petitioner personally interview the applicant.*

In our view, the ideal situation would be for each applicant to appear in person before the Board in the company of such representation as he may choose. Failing that, it should be the condition of the completion of an application that the applicant approve the representation provided him and that he be personally interviewed by that representative. In the previous section, we have noted that the members of the Board have shown themselves to be substantially impressed by the quality of representation. That being the case, it necessarily follows that the Board should make every effort to upgrade the quality of the representation provided to inmates by the Commonwealth. A significant step in that direction would be the requirement that the Pardons Case Specialist assigned to an applicant actually become his advocate rather than being someone who stands up and summarizes the recommendations of the Bureau of Correction in

public hearings. To this end, we would recommend that, if possible, either Pardons Case Specialists become specialists in more than name and are assigned exclusively to the duty of representing applicants before the Board of Pardons or, alternatively, each institutionalized applicant be represented by his own institutional counselor or a counselor of his choice.

5. *Clemency procedures should be adversary rather than ex parte in nature; therefore, the State should be regularly represented at Pardon Board hearings.*

At present, assistant district attorneys in Philadelphia County and in Allegheny County usually appear before the Board and either say "no objection" or present an argument against clemency. In other counties, the district attorney replies in writing. We would recommend that an attorney for the State, whether the prosecuting attorney or an assistant district attorney or district attorney currently in office, should regularly appear, particularly if the district attorney or other members of the community oppose the granting of clemency to a particular applicant. We feel that the development of an adversary system would serve to strengthen the quality of representation on both sides and also improve procedure at Pardon Board hearings. A notation might be added to announcements advertising the listing of an application with the Board of Pardons advising those who wish to oppose it to contact the district attorney. The establishment of this system should not, of course, be construed to preclude the option of citizens to oppose individually a grant of clemency or to retain private counsel for this purpose.

6. *The appropriate advocate for those segments of the community opposing a grant of clemency is the district attorney; the opinions of sentencing judges should not be solicited.*

The framers of the constitutional provision under which the Board of Pardons was originally created were well aware of the dangerous inconsistency of involving members of the judiciary in pardon decisions. All such proposals put before the 1873-74 Constitutional Convention were soundly defeated. Former Governor Curtin made his views on the matter unmistakable: "When a judge has discharged his duty in sentencing a criminal, after conviction, his connection with the destiny of the criminal should terminate forever and he should not be recalled to sit in judgment upon his pardon." One has only to put himself in the place of a judge whose opinion on a grant of clemency has been solicited to see the sense in this statement. Either he must adhere to the judgment he originally handed down, whether or not he still feels it is justified, or he must admit that he was prejudiced, had insufficient information, or improperly avoided consideration of special circumstances in imposing sentence. His third alternative is to leave the clemency decision to the discretion of the Board -- a course many wise judges have chosen. In all cases, his opinion must be regarded as practically worthless. Whether or not the pardon authority wishes to avail itself of the opinion of a judge or other official, it should not be required either by the constitution or by statute. The Model State Constitution makes no such requirement.

As we have noted in the previous section, Board of Pardons Rule No. 91 seems to imply that the Board is required by the Act of April 24, 1931, P.L. 71,

71 P.S. Section 299a, to request the opinions of judges and district attorneys when, in fact, this is not the case. The statute cited merely charges these officials with replying promptly to Board of Pardons requests. The present system of forwarding copies of each application to judges and district attorneys, then, constitutes no more than an act of courtesy on the part of the Board. As we have indicated, we favor the development of an adversary system for clemency hearings, and the office of the district attorney of the county in which the crime was committed seems the most logical base for the development of cogent opposing arguments. In our view, however, judges should not be involved, as solicitation of their opinions by the Board of Pardons places them in a position in direct contradiction to the basic principle of our legal system that justice is blind. They may, of course, receive notification and register their opinions in the same way as any interested citizen -- through the district attorney, by letter, or by personal appearance at Board of Pardons hearings.

7. *Make arrangements to hold hearings at some public place with satisfactory acoustics or PA system so that interested parties may be able to hear the proceedings. We also feel that the ostentatiousness of the Supreme Court rooms in Pennsylvania overpowers petitioners and witnesses and tends to inhibit straightforward responses.*

This recommendation speaks for itself. Briefly, though, the Board presumably does not adhere to judicial procedure and rules of evidence because in order to establish grounds for clemency the Board must often hear personal testimony which would not be admissible in court. It would seem, then, that to hold hearings in a setting which intimidates witnesses would be counter-productive.

As for the first part of this recommendation, NCCD consultants attending the March 22, 1973 Board of Pardons sessions held in the Supreme Court room at Harrisburg found that beyond the second or third row of benches so much of the testimony was inaudible that it became impossible to follow the proceedings with any hope of comprehension.

8. *The Board should pay close attention to the quality and nature of testimony presented to it. In particular, the Attorney General should take it upon himself to notify the other members when, in his opinion, the statements of a witness constitute hearsay.*

In the 1963 case Commonwealth *ex rel.* Cater v. Myers, *supra.*, the court held that no imposition of rules of evidence or strict procedure can be made upon Board of Pardons hearings and stated further that the lack of such limitations may actually have a salutary effect due to the unique nature and requirements of executive clemency. While we agree that it would be contradictory to state that the Board of Pardons is properly concerned with matters other than the legal facts of the case and yet impose legal procedures and rules of evidence upon its hearings, we feel it necessary to point out that the lack of any such structure places an additional burden of responsibility upon Board members to exercise caution in receiving testimony. The most obviously qualified member to perform such screening is the Attorney General; he should not hesitate to call the attention of other members to such statements as he considers questionable. Consultants who attended Board of Pardons hearings were particularly disturbed, as were apparently some members of the Board, at the frequency with which hearsay was introduced.

9. *Establish some criteria for granting executive clemency.*

Among the factors hampering Board of Pardons decision-making are a lack of time for discussion and reflection after hearings, and a lack of established guidelines for granting clemency. In the case of pardons, another hindrance in the past may have been a general belief on the part of Board members that a pardon carries with it legal effects which, as we have shown, such a grant does not entail. In essence, a grant of pardon constitutes no more than an expression of the State's forgiveness -- though not forgetfulness -- of the offense for which the recipient had been convicted. This is not to downgrade the social and psychological side effects of a pardon which, even if its legal implications were specifically and entirely eliminated, would remain considerable. It does, however, suggest that the Board should eliminate as a predominant criterion for granting a pardon the requirement that the applicant show a need for it.

As previously recommended, commutation of minimum and maximum terms for parole purposes should be rendered unnecessary by statutory changes awarding appropriate authority to the Board of Parole. Until such changes have been made, the procedure suggested in Long-term Recommendation 1 should be established, and the only criteria needed for such commutations should be the recommendation of the Board of Parole. Other commutations serving the purpose of adjusting inequities or injustices would require criteria to measure such factors as unfairness, innocence or dubious guilt, or legislative lag

behind changes in the social, political or economic structure of society making previous penalties unacceptable or undesirable. As important as any of the others is inequity arising when sentence provisions are changed by the legislature which are not made retroactive for prisoners serving terms under the previous and more punitive provisions.

Ultimately, the Board of Pardons must establish its own criteria for recommending clemency. One way to do this would be for each member to record specific reasons for his vote in each case. The reasons listed by the members over a period of time could then be collated, categorized and discussed in terms of the desirability of each. In general, however, we would recommend the following guidelines, a number of which we have already observed to be in use in pardon decisions.

The obvious overriding criterion in pardon cases must be the question of whether more good to the community will result from pardoning the applicant than benefit to the public or to him by its refusal. The rule that pardons be granted only after service of sentence should ease the Board's decision-making in this respect somewhat in that there can be no question but that the law has been fully vindicated. What remains, then, is for the Board to decide whether or not the convict's subsequent behavior has been such that he merits the final action of pardon and that punishment beyond that already endured would be inequitable, unnecessary and excessive. Judgment of the applicant's adjustment in the community is, of course, a highly subjective area in which only the rudest general outlines can ever

be formulated. However, if it appears that an applicant has established a stable homelife and is making a genuine effort to provide for himself and his family, it would seem that little reason could be found for refusing to ease the burden of a criminal conviction by granting a pardon.

In his book *The Effectiveness of a Prison and Parole System*, criminologist Daniel Glaser, after comparing statistics from New York, Wisconsin, California, and Pennsylvania, concludes: "Apparently, a three-year follow-up provides about ninety per cent of the probably future returns to prison data." The California study, an eleven-year follow-up of those paroled in 1951, provides the most conclusive proof of this thesis, demonstrating a recidivism curve which peaks in the first three years after release, then drops off sharply. A clean record of some years after completion of a sentence is already viewed favorably by the Board; this criterion should be standardized to some period of time the members of the Board feel comfortable with. We would recommend three to five years after release from incarceration, or one to two years after release from parole supervision or completion of a term of probation -- after which only the strongest indications of continued anti-social tendencies should serve to intervene and cause a denial.

Pardons for those whose offenses fall within the category known as "victimless" crimes should be virtually automatic. Victimless crimes include gambling, prostitution, the sale or exhibition of pornography, and sexual offenses generally. The establishment of a legal, state-run lottery in Pennsylvania casts serious doubt on the advisability of denying pardons to those previously

convicted of illegal lottery or poolselling. In our view, the only substantive reasons for such denials would be the presence of strong evidence indicating a continuing connection between the applicant and his activities and organized crime, or a record of other offenses showing a more general propensity toward criminal behavior. Repeated arrests on the same charge should not be so regarded, particularly in this area, since it is a well-known tendency of police departments to continue to arrest and harrass petty offenders. Similarly, those convicted of sexual offenses not involving minors or assault should probably be pardoned in the absence of evidence of more serious criminal tendencies. Further, cases involving such offenders should be examined according to criteria other than the likelihood that the applicant remains sexually deviant; especially in cases where the community has shown a willingness to accept the offender, a pardon should probably be granted.

In considering a pardon, the Board should not be insensitive to the cultural differences between its members and the applicants who come before them. If, for example, a man were convicted for carrying a concealed deadly weapon, a knife, the Board must judge whether the applicant was carrying the knife in contemplation of committing an assault or if he was simply conforming to a cultural situation in which carrying a knife for one's own protection is characteristic. If this minor weapons offense was the only blot on the applicant's record, the Board might well conclude that, within his culture, he was an exemplary citizen and grant his petition for a pardon. It is in precisely such cases that the pardon -- in effect, the State's recognition of the recipient as an honest citizen -- can do the most positive good.

Continued assertion of innocence should, in most cases, serve neither as a criterion for granting a pardon nor for denying one. The Board of Pardons is ill-equipped to determine innocence or guilt in a judicial sense, and for the limited purpose of its deliberations should probably avoid assuming either. An applicant who professes innocence of the crime for which he was convicted, it should be remembered, may just as easily be demonstrating true innocence as a "bad attitude". For the Board to base its decisions on whether or not an applicant has learned to play the game of corrections (e.g., "I know what I did was wrong, I am prostrated with remorse, and I have made an honest effort to rehabilitate myself.") does not seem to us a viable approach to pardons. Each applicant should be regarded as simply "convicted", and should not be penalized for the bad form of refusing to admit it.

The Board should not completely deny the possibility of recommending pardons on grounds of innocence or of dubious guilt. Judicial appeals are subject to time and other limitations and clear cases of wrongful convictions do occur from time to time for which the remedial possibilities of appeal prove inadequate.

Naturally, since the presumption of innocence does not survive a verdict of guilty, the petitioner for a pardon on the ground of innocence must bear a heavy burden of proof. But in cases where judicial correction is not available and an applicant alleges that his conviction was based on insufficient, unreliable or perjured evidence, or that the trial was unfair in any of various respects, he should at least have the right to be heard.

This is one area in which the Board of Pardons might legitimately expand its activities. It must be remembered, however, that should the Board actually find such an applicant innocent, the legal effects of an ordinary pardon would have to be deemed insufficient. In such cases, it would be only proper for the Board to order a complete expungement of the convict's record.

10. *The Board of Pardons should cease and desist hearing petitions for commutation of minimum terms altogether, and for commutation of maximum terms where the petitioner is not physically confined in a correctional institution.*

Due to inadequate statutes, the Board of Parole is denied the authority currently to hear applications for parole until the service of a minimum term prescribed in the sentence. It is further denied the authority to discharge a parolee from further obligation on his sentence prior to the expiration of the maximum term prescribed in the sentence. To compensate for these inadequacies, the Board of Pardons hears applications for the reduction of minimum terms so that the prisoner may become eligible for parole consideration, and applications for the reduction of maximum terms so that the prisoner may be discharged from parole supervision.

Until such time as the statutes are changed to provide the Board of Parole with the proper authority to grant parole without regard to a minimum term, and to discharge a prisoner from parole before the expiration of the maximum term, the Board of Pardons and the Board of Parole

should jointly establish policies and procedures whereby the Board of Parole regularly and routinely reviews the cases in prison and on parole, and submits to the Board of Pardons deserving cases for whom it recommends commutation of minimum and maximum terms.

Of course, since the law enables any prisoner to apply for clemency, the above recommendation does not intend to remove this right. However, with a regular and routine review by the Board of Parole, few prisoners will feel the need to initiate a clemency petition simply for the purposes of parole eligibility or discharge from parole supervision.

There remains, however, a need for clemency to correct inequities and injustices in sentences, the commutation of which may or may not effect immediate release from confinement. At any rate, these kinds of cases are appropriate clemency matters and should not involve the parole process. Decisions to be made on the basis of inequities or injustices do not involve concepts of rehabilitation, readiness for release, nor do they necessarily involve concepts of dangerousness or the likelihood of a person to repeat criminal acts in the future. Rather, they involve concepts of fairness, innocence or dubious guilt, and changes in the social, political, and economical structure of society that have not been reflected in statutory revisions.

In rare cases where it may be appropriate to consider whether or not a prisoner may constitute a danger to the community if released, the *Model Sentencing Act* reproduced in Appendix I offers guidelines for determining

the dangerousness of an offender. However, it is difficult to imagine a circumstance wherein clemency might be indicated on the basis of inequities or injustices, but denied on the basis of the person's dangerousness. Neither pardon nor parole should be able to impose or prolong imprisonment that a court cannot with equity and justice impose.

11. *The Governor should receive clemency recommendations directly from the Board without the intervening step of screening by a legal aide.*

So long as the Board of Pardons exists, the present structure of clemency as provided in the constitution separates the Board from the Governor and it is understandable that the governor would desire someone directly responsible to him to screen the Board's recommendations before exercising his power to grant or deny clemency. However, for all Board recommendations to routinely be processed through an intermediate is time-consuming and tends to convey an attitude of distrust of Board decisions. It is recommended that only those cases which the governor specifically desires legal or other advice be referred by him to a person of his choosing.

12. *Provide a procedure that insures that a petitioner is notified as soon as his application for clemency is denied.*

In the aforementioned survey of applicants denied commutation of their minimum sentences, their responses indicated that present procedures for notification of denial are inadequate (see Appendix E). Regardless of

whether or not the Board chooses to give any reasons for its refusal, inmates indicated an expectation that some kind of official notification should be sent to them personally. In some cases, representatives also apparently assumed that this would be the case -- with the result that a few applicants received no notification at all. In our view, initial notification should come from a specific and formalized source; that source should probably be the inmate's institutional counselor. Such a provision would be consistent with the adoption of our recommendations 1 and 4, above. Verbal notification by the counselor should be followed as soon as possible by written confirmation addressed to the applicant.

13. *Give some reason to the petitioner for a denial rather than a flat, impersonal "denied".*

The Board of Pardons is not required to give reasons for its refusal to recommend a pardon or commutation. However, the Board should keep in mind that when, as is presently the case, reasons are not given, this information vacuum is filled with speculation and that the overall result is a feeling on the part of applicants that Board decisions are arbitrary at best and are more likely subject to political influence. Good practice would dictate that some impression that the denial was the result of a rational process be allowed to issue outside of executive sessions.

This could probably be best accomplished by a series of form letters, the most appropriate of which would be sent to the applicant over the signature of the Secretary of the Board of Pardons. Since the exercise of executive

clemency should be reserved for extraordinary circumstances, there should be no great difficulty in notifying an applicant when such circumstances do not obtain.

14. *The final decision as to whether or not an individual, whose minimum term has been commuted, should be released to the community should rest with the Parole Board.*

Pennsylvania law stipulates "that if the Board of Parole refuse to parole the prisoner at the expiration of any minimum term fixed by the Pardon Board, it shall, within ten days after the date when the minimum term expired, transmit to the Pardon Board a written statement of the reasons for refusal... Thereafter, the Pardon Board may either accept the action of the Board of Parole or order the immediate release of the prisoner on parole under the supervision of the Board of Parole." 1941, August 6, P.L. 861, Section 21; 1943, May 27, P.L. 767, Section 10; 1951, August 24, P.L. 1401, Section 4.

If minimum terms are eliminated, the Board of Pardons will no longer be able to affect the release of a prisoner except by pardoning him or commuting his maximum sentence to a term less than that already served unless new statutes provide otherwise. A law eliminating minimum terms should make those sentenced to imprisonment for life eligible for parole; if it fails to do so, the joint policies and procedures recommended as an interim procedure in recommendation 10 should continue to apply to life sentences. Pending enactment of the recommended statutory changes, the Board of

Pardons should refrain from exercising its power to mandate release by parole. This is not to interfere with the right and power of clemency to release a prisoner by commutation, with or without conditions, but only to reserve parole decisions to the Board of Parole.

15. *Work out a systematic plan to provide in-put and up-to-date feedback on statistical material so that Board members are fully informed at all times on the volume and nature of Board activity and, further, of significant statistical trends within the Pennsylvania correctional system.*

The Board of Pardons cannot operate in an information vacuum. Board members should receive regular reports, preferably quarterly, which provide a profile of Board of Pardons activity and highlight any significant trends. The Bureau of Criminal Statistics has already indicated a willingness to cooperate in the development of such a program. As an example of the kinds of special information which might be sought, a brief review of Board of Pardons files by our researcher revealed that although in 1971 56.4 per cent of those incarcerated in Pennsylvania correctional institutions were black, blacks comprised only 42.5 per cent of those submitting new applications for clemency -- despite the fact that in Pennsylvania, as in most states, blacks tend to be charged with more serious offenses than whites and to be given longer sentences, making them prime candidates for executive clemency. These figures do not imply discriminatory practices on the part of the Board of Pardons and are by no means conclusive in any case; but

they do tend to indicate that institutionalized blacks are less likely to receive information and encouragement about the possibilities of applying.

16. *Provide more suitable quarters for the Board of Pardons staff. The work of the Board is of public interest and should be more visible to the public.*

Obviously, we do not consider the adoption of this recommendation to be of paramount importance. However, in our visits to the Board of Pardons office, we could not help but recall Professor Parkinson's statements with regard to the confluence between the importance of various departments within an organization and the office space to which they are assigned. In an impromptu survey of guards around the capital complex, five out of eight questioned had never heard of the Board of Pardons, a sixth gave directions to the Board of Probation and Parole, and the remaining two had considerable difficulty in explaining how to find the offices.

APPENDIX A

APPENDIX A

APPLICATION FOR CLEMENCY:

Facsimile of Present Application Form. A-1

Suggested Application Form A-5

Application for Clemency:

COMMONWEALTH OF PENNSYLVANIA

BOARD OF PARDONS

No. _____ Session _____
(DO NOT fill in above spaces)

(True name of applicant)

to the Honorable, The Members of the Board of Pardons:

You are respectfully requested to recommend to His Excellency, the Governor of the Commonwealth

of Pennsylvania,
that he

{ commute death sentence to life imprisonment
commute life imprisonment to life on parole
commute my minimum sentence
commute my maximum sentence
grant me a pardon
remit fines and forfeitures

Strike out

all but one

Have you previously filed an application with the Board of Pardons?

If so, when was last application filed?

Date of Hearing:

Date and place of birth.

What aliases, if any, have you used?

State briefly details of crime, or crimes for which you are requesting Pardon or Commutation. (Please complete in your own words.)

No. 571 If more than one crime, or County of sentence is involved in your answer to question No. 4, attach rider answering questions Nos. 5 to 9 inclusive. Indicate each one in chronological sequence.

ALL COPIES MUST BE CLEAR, CLEAN AND LEGIBLE

DO NOT WRITE HERE

Checked
Filed & paid.
Letter Mailed
Served:
Inst.
Bd. of P.
D.A.
Judge
Reinst. Fee
Rehearing Granted

5. In what county were you sentenced and by what judge?

On what date?

What Term and No.?

Effective date of sentence:

For what crime?

6. What was the court's sentence, including fine and to what institution were you sentenced?

7. In what institution are you now confined?

No.

Parole No.

8. Expiration of minimum:

Expiration of maximum:

9. Name of lawyer who defended you:

10. Give a statement of the sentences of all your accomplices in the crimes for which you are petitioning for clemency.

Name

Charge

Date

Result

Sentence

Place of
Confinement

11. Why do you believe your application should be granted? (Please complete in your own words.)

12. Have you ever violated parole or probation? If so, specify.

Do you have any Detainers outstanding?

How have you conducted yourself while confined, and have you made an honest effort for self-improvement? If not confined, give brief statement of your activities. (Please complete in your own words.)

If NOT confined, or if confined in a County Institution, have you obtained 5 prints of passport type photographs, 2 1/4" x 3 1/2"? (To be submitted with application).

If granted commutation, where and with whom will you reside?

Are you presently under medical care? _____
(Yes or No)

If so, for what?

Supply names and addresses of doctors treating you.

18. Will you have employment if released? _____. If "yes", give name and address of your prospective employer. If "no", how will you be able to maintain yourself? State your resources and the names and addresses of relatives or friends who will assist you.
19. Give the name and address of the lawyer or other person who will represent you before the board.

True name of applicant --- Signature

PARDON APPLICATIONS ONLY

An application for Pardon must have attached hereto a statement setting forth every arrest whether or not the arrest resulted in conviction. The statement must also include arrest in any jurisdiction outside Pennsylvania including the Federal jurisdiction. The statement must contain the following information:

Date of Arrest	Place of Arrest	Crime Charged	Disposition
----------------	-----------------	---------------	-------------

IMPORTANT

Have you enclosed filing fee? (Rule 22)	(\$15.00)	_____ Check
If NOT confined, applicant must appear personally before the Board (Rule 40)		_____ Check
Are photographs enclosed? (Rule 116)		_____ Check
Argument must be brief. (Rule 53)		_____ Check

YOUR CASE WILL NOT BE LISTED FOR HEARING UNTIL ALL QUESTIONS HAVE BEEN ANSWERED, AND STIPULATIONS PROVIDED BY THE RULES OF THE BOARD OF PARDONS HAVE BEEN FULLY MET.

Application for Clemency:

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PARDONS

No. _____ Session _____
(DO NOT fill in above space)

(True name of applicant)

To the Honorable, The Members of the Board of Pardons:

You are respectfully requested to recommend to His Excellency, the Governor
of the Commonwealth
of Pennsylvania, that he:

commute life imprisonment to life on parole
commute my minimum sentence*
commute my maximum sentence
grant me a pardon
remit fines and forfeitures

(Strike out all but one)

- 1. Aliases (if any):
- 2. Date and place of birth:
- 3. If granted commutation, where and with whom will you reside?
- 4. Will you have employment if released? (If "Yes," give the name and address of your prospective employer. If "No," how will you be able to maintain yourself? State your resources and the names and addresses of relatives and friends who will assist you.)
- 5. Are you presently under medical care? If so, for what illness? Supply the names and addresses of Doctors treating you.
- 6. Have you previously filed an application with the Board of Pardons? If so, when was your last application filed? Date of hearing:
- 7. Give the name and address of the person who will represent you before the Board.

NOTE: It is important to the Board that the following questions be answered in the applicant's own words. Any indication that this condition has not been complied with may jeopardize this application.

8. State briefly the details of the crime or crimes for which you are applying for clemency.
9. Describe your conduct while confined, including any efforts you have made at self-improvement. If not confined, give a brief description of your activities.
10. Why do you believe your application should be granted?

True name of applicant - signature

IMPORTANT:

If NOT confined, applicant must appear personally before the Board. (Rule 40)

Argument must be brief. (For details, see Rule 53)

Your case will not be listed for hearing until all questions have been answered, and stipulations provided by the rules of the Board of Pardons have been fully met.

*Applications requesting commutation of minimum sentences are regularly referred to the Board of Probation and Parole for recommendation.

APPENDIX B

APPENDIX B

GENERAL OUTLINE EMPLOYED BY PAROLE INVESTIGATORS IN PREPARING REPORTS FOR THE BOARD OF PARDONS

From a Memo by
John J. Burke
Parole Case Specialist
Dated January 7, 1966

I. Present Status and Reputation

- A. Residence address. Type of residence, rented, owned or being purchased, etc. Brief statement as to occupants. Estimate of home conditions and neighborhood standards.
- B. Marital status and family composition. Married, divorced, single, widowed. If married, wife's maiden name, date of marriage, compatibility. List names of children, if any, and their ages. A brief statement as to economic status of family. Reference to any previous marriages and/or paramour relationship and statement as to how dissolved; if any children were born, their names, addresses, ages and how supported should be listed under this subheading.
- C. Employment (Present). Name and address of employer. Type of work performed. Gross pay (weekly). Duration, Social Security number. Observe tax statements and list information in report. Is the employer aware of criminal record?
- D. Resources. Equity in home, other property owned, car, investments, life insurance, checking or savings account (where and balance). Is wife or other members of family employed? Total family earnings.
- E. Liabilities - Indebtedness. Loans, mortgages, installments, support payments, if any, credit standing.
- F. Membership in Organizations and/or other Civic Activities. Offices held. Leisure time activities.
- G. Religious interests. Denomination, affiliation, participation, extent and depth of interest.

II. Mobility and Travel. Various addresses at which subject has lived in the last ten years. List time that he lived at each address.

- III. Employment History (Past 10 years). Names and addresses of previous employers, type of employment, duration and reasons for leaving.
- IV. Educational History. Scholastic achievement, vocational or trade training.
- V. Military Record, if any. Branch of Service, Serial Number, date entered. Date of discharge and type, rank attained. If rejected, date and why.
- VI. Community Reputation and References. What is desired is the opinion in the community as to the applicant's standing. He may have a criminal record, yet be well liked and regarded highly. He may be a known racketeer, but occupy a prominent place in community activities. The important factor for the Pardon Board is the community's estimate of the man, which may have bearing on their reaction to pardon, if granted. Information should be gathered as to applicant's honesty, industry, credit standing, regard for his family and fellow man, as well as the regard of others for him, despite his crime.

In investigating the reputation of applicants for pardon, the agent should use references that are unbiased and not rely solely on references supplied by the person being investigated. We should never eliminate references or fail to investigate the reputation simply because the agent knows the applicant personally. Local police jurisdictions should always be contacted for their estimate of applicants' reputation in the community.

- VII. Applicant's reasons and need for clemency and support for same.
Self-explanatory.
- VIII. Brief summary by the investigator of subject's community adjustment in view of results of the investigation. No recommendation is to be made.

Any additional pertinent information which may come to the investigator's attention concerning the applicant should be included in the report, even if a specific reference to it has not been included in this outline.

APPENDIX C

APPENDIX C

PENNSYLVANIA BUREAU OF CORRECTION
COMMUTATION SUMMARY C-1

PENNSYLVANIA BUREAU OF CORRECTION
INITIAL CLASSIFICATION SUMMARY C-4

PENNSYLVANIA BUREAU OF CORRECTION
PAROLE VIOLATOR CLASSIFICATION SUMMARY C-9

SAMPLE SUMMARIES OF RECOMMENDATIONS BY
INSTITUTIONAL STAFF C-10

PENNSYLVANIA BOARD OF PROBATION AND PAROLE
SUMMARY OF INVESTIGATION C-11

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
BUREAU OF CORRECTION

STATE CORRECTIONAL INSTITUTION - _____

C O M M U T A T I O N S U M M A R Y

Date: _____

GENERAL INFORMATION

Inst. No. _____ Parole No. _____ Name _____
Present Age _____ Race _____ Citizenship _____ Marital Status _____
Intelligence Rating _____ I.Q. _____ Test Employed _____

CURRENT CASE

Offense _____

Arrested _____

Term of Court _____

Trial Judge _____

County _____

Date of Admission _____

Arrested _____

Received by Transfer _____

Length of Sentence _____

Expiration of Minimum _____

Effective Date _____

Expiration of Maximum _____

Current Sentence _____

Total Time Served _____

ACCOMPLICES AND DISPOSITION

D. DETAINERS

E. PREVIOUS ARRESTS AND CONVICTIONS

F. PREVIOUS CRIMINAL RECORD

G. MISCELLANEOUS DATA

H. INSTITUTIONAL REPORTS

CONDUCT:

VOCATIONAL: Record of Work Assignments.

EDUCATION AND/OR LEISURE ACTIVITY:

ACADEMIC SCHOOLING:

MEDICAL:

TSIDE CONTACTS:

VINGS AND SOURCE:

PORT ON PAROLE PLAN:

MARY OF PROGRESS:

Counselor's Name
Title

C O N F I D E N T I A L

Form JBC-1A
CC-50M-9-72

COMMONWEALTH OF PENNSYLVANIA

DEPARTMENT OF JUSTICE

BUREAU OF CORRECTION

Supersedes Form JBC-1 which may be used for
cases prior supersessionI N I T I A L
C L A S S I F I C A T I O N S U M M A R Y

BC Number	PBP Number	Commitment Name	☐ TN	Institution	Date
-----------	------------	-----------------	-----------------------------	-------------	------

1. PERSONAL DATA

Aliases (TN)				Race	Sex
Date of Birth	Place of Birth	Religion	Marital Status	Height	Weight
Legal Address			Arrest Address		
Occupational Title	Intelligence Rating	Educ. Achievement Grade	Grade Completed	Medical Profile	
Military Service	Serial Number	Dates of Service	Type of Discharge		
Social Security No.	USINS No.	Selective Ser. No.	FBI No.	BCI No.	
Past or Present Problem Areas					
☐ ALCOHOL ☐ NARCOTICS ☐ SEXUAL ☐ PSYCHIATRIC ☐ ASSAULT ☐ ESCAP					

2. PREDOMINANT SENTENCE DATA

Date of Sentence	County	Court, Indictment Number, Term	Type Sent.	Minimum		Maximum		Judge	Offense
				Y	M	Y	M		

Cont. from BC #	Plea	Total Sentence	Commitment Credit	Escape T
Date of Reception	Effective Date	Minimum Date	Maximum Date	PV Effective Date
Delinquent Time		Backtime	New Maxi	
☐ TPV ☐ CPV ☐ PVCO		Intersystem Transfer From	Date Other Release	Date Paroled
		Date Reparoled 1	Date Reparole	

3. DETAINERS

Dated	From (Incl. Address)	Charging	Indict. Warrant Nos.	Remarks

4. REMARKS

CONFIDENTIAL

C-4

RELATIVE ET AL (*Indicates who to notify in case of necessity)

Name	Relationship	Born	Married	Education	Occupation	Address

RESIDENCES

From	To	Address	With Whom

EMPLOYMENT RECORD

From	To	Employer and Address	Type of Work	Wages	Reason Left	Reemploy?

SCHOOLS

From	To	School	Address	Last Grade Completed	Reason Left

Source of Record	Information Sources

1. CRIMINAL RECORD

2. STATEMENT OF OFFENSE

(Abstract, Report of Clerk of Court, County of Offense)

(Inmate's Version)

Accomplices:

Disposition:

3. SOCIAL AND ECONOMIC BACKGROUND

FATHER:

STEPFATHER:

MOTHER:

STEPMOTHER:

SIBLINGS:

FAMILY DELINQUENT:

HOME CONDITIONS AND NEIGHBORHOOD STANDARDS:

IN CASE OF NECESSITY, NOTIFY:

4. PERSONAL DATA
(compiled by caseworker)

5. MARITAL HISTORY
(compiled by caseworker)

CHILDREN:

6. EDUCATIONAL HISTORY
(report of education director)

- Education and training in schools
- Scholastic ratings and attendance record
- Interest in further education
- Vocational interests
- Achievement and evaluation test results

7. VOCATIONAL HISTORY
(report of vocational advisor)

<u>Kind of Work</u>	<u>Employer</u>	<u>Salary</u>	<u>Length of Time</u>	<u>Term.</u>	<u>Re-emp.</u>
---------------------	-----------------	---------------	-----------------------	--------------	----------------

8. RELIGIOUS HISTORY
(report of chaplain)

9. MEDICAL REPORT
(report of physician)
10. PSYCHIATRIC REPORT
(report of psychiatric division)
11. PSYCHOLOGY REPORT
(report of psychologist)
12. SOURCES OF VERIFICATION

C O N F I D E N T I A L

m JBC-192
10M-6/72
P A R O L E V I O L A T O R
L A S S I F I C A T I O N S U M M A R Y

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF JUSTICE
BUREAU OF CORRECTION
Supersedes Form JBC-1 which may be used for
cases prior supersession

Number	PBP Number	Commitment Name	☐ TN	Institution	Date
--------	------------	-----------------	-----------------------------	-------------	------

PERSONAL DATA

ises (TN)

Race

Sex

of Birth

Place of Birth

Religion

Marital Status

Height

Weight

l Address

Arrest Address

opational Title

Intelligence Rating

Educ. Achievement Grade

Grade Completed

Medical Profile

tary Service

Serial Number

Dates of Service

Type of Discharge

al Security No.

USINS No.

Selective Ser. No.

FBI No.

BCI No.

or Present Problem Areas

☐ ALCOHOL ☐ NARCOTICS ☐ SEXUAL ☐ PSYCHIATRIC ☐ ASSAULT ☐ ESCAPE

PREDOMINANT SENTENCE DATA

ate of ntence	County	Court, Indictment Number, Term	Type Sent.	Minimum		Maximum		Judge	Offense
				Y	M	Y	M		

. from BC #

Plea

Total Sentence

Commitment Credit

Escape Time

of
ption

Effective Date

Minimum Date

Maximum Date

PV Effective Date

Delinquent Time

Backtime

New Maximum

TPV ☐ CPV ☐ PVC0

Intersystem Transfer From

Date Other Release

Date Paroled

Date Reparoled 1

Date Reparoled 11

DETAINERS

Dated	From (Incl. Address)	Charging	Indict. Warrant Nos.	Remarks

REMARKS

CONFIDENTIAL

C - 9

APPENDIX C

SAMPLE INSTITUTION STAFF RECOMMENDATIONS

<i>Applicant</i>	<i>Recommendations</i>
Applicant X Huntingdon, F-0000	Entire staff is opposed to clemency in view of need for more gains on part of applicant in several areas: counseling, employment, education and interpersonal relationships. Applicant attends group counseling sessions but does not participate; his intellectual limitations preclude significant achievement educationally or vocationally. He has enough concentration, however, to serve him well in functioning at somewhat higher levels. Applicant has clear conduct, good work reports and holds Class A outside status. The staff views him as a candidate for Community Treatment placement at a later date.
Applicant Y Rockview, H-0000	Entire staff is in favor of clemency in view of applicant's continued excellent progress in his program: clear conduct, job assignment in the Print Shop with Class C outside status without supervision, participation in group therapy that has resulted in more insight and better control over his former propensity to act out. There is indication he will be able to function outside and not engage in anti-social acts. The psychiatric and psychological reports are in support of staff thinking.
Applicant Z Camp Hill, P-0000	Three staff members are in favor of clemency in view of applicant's clear conduct record and above average institutional adjustment. He has been active in school (GED Program), involved in sound vocational courses (Auto Shop), and registered with BVR. He participates in AA and is now on his third group counseling session. The lone staff member who opposes clemency does so on insufficient time served for the offense and because progress made to date has not been sufficient to justify feeling he has control over his alcohol problem. The majority feel that further incarceration will not be beneficial to the applicant; there is, however, an underlying premise: providing applicant keeps away from alcohol. There are no psychiatric or psychological contraindications to commutation, although it is suggested he will profit from supervision and counseling outside.

APPENDIX C

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROBATION AND PAROLE
HARRISBURG

S U M M A R Y O F I N V E S T I G A T I O N

FOR THE BOARD OF PARDONS

NAME:	INSTITUTION:	PAROLE NO.
	NUMBER:	DATE:
		D.O.

TO: THE HONORABLE, THE MEMBERS OF THE BOARD OF PARDONS

FACTS OF CRIME:

OTHER INFORMATION:

Reputation of Applicant

Parole Violations

Comments of Judge and
District Attorney

Other Tried or Untried
Indictments

Accomplice

Fines and Costs

Last Known Address
of Victim

Signed by Parole Investigator

APPENDIX D

APPENDIX D

BOARD OF PARDONS
COMMONWEALTH OF PENNSYLVANIA
RULES

MEMBERS OF THE BOARD

Lieutenant Governor -- Chairman

Attorney General

Lawyer -- Appointed

Penologist -- Appointed

Doctor -- Appointed

I. EXECUTIVE CLEMENCY

Rule 1. Action by the Board

The Board of Pardons hears and acts upon applications for clemency of five types: (a) a pardon, (b) a commutation of death sentence to life imprisonment, (c) a commutation of the minimum sentence of a confined person, (d) a commutation of the maximum sentence of a person whether or not confined and (e) a remission of fines and forfeitures.

II. APPLICATIONS

Rule 20. Forms

All applications must be made on forms prescribed by the Board. Such forms may be obtained from the Secretary of the Board at a charge of two dollars per set.

Rule 21. Filing

Applications must be filed with the Secretary of the Board of Pardons, State Capitol, Harrisburg, Pennsylvania, and may be filed at any time. An original and ten copies of the application must be filed except as provided in Rule 71 for capital cases.

Rule 22. Filing Fee

In all cases except capital cases a filing fee of fifteen dollars will be charged. Such fee must accompany the application and is not refundable.

Rule 23. Use of Applications

A copy of each application will be sent by the Board to the court and to the district attorney of the county from which the applicant was sentenced; to the correctional institution in which the applicant was or is confined in order to obtain expressions of opinion as to the merits of the application; and to the Board of Probation and Parole of the Commonwealth for its investigation.

Rule 24. Limitation on Filing

Except as provided in Rule 25, an application may not be filed before the expiration of twelve months from a previous filing.

Rule 25. Subsequent Filing in Less Than Twelve Months

An application filed before the expiration of twelve months from a previous filing will be listed for hearing only upon prior approval of at least two members of the Board of a petition for early filing submitted by the applicant. Otherwise, the application will be returned and the filing fee refunded.

Rule 26. Application to be Public

The application itself, and decision or opinion if one is filed, but not the opinions and reports obtained by the Board under Rule 23, shall be open for public inspection at the office of the Board in Harrisburg during usual working hours.

Rule 27. Subsequent Use by Applicant

An applicant or his representative or any of the persons named in Rule 23 may obtain a photostatic copy of any prior application filed by the applicant upon payment of the charge for the photostating.

III. LISTINGS

Rule 30. Time of Listing

Applications accepted, except for those in Capital (Death) Cases, shall be subject to investigation prior to listing in the Calendar. When it has been determined that the application is complete in setting forth all required information the applicant, or representative, will be notified of the place and date of hearing.

Applications relating to Capital (Death) Cases shall be filed in accordance with the provisions of Article VII.

Rule 31. Advance Listings

Applications, in other than capital cases, may be listed for hearing prior to the time set forth in Rule 30 only for cause shown and upon approval of at least two members of the Board. Allowance of advance listing by the Board shall not constitute a waiver of any requirement of these rules except the time for listing as set forth in Rule 30.

IV. REPRESENTATIVES

Rule 40. Applicant's Representative

An applicant, if not confined, shall appear personally unless excused by the Board for cause; if confined, he may designate any other person to appear for him. Only attorneys entitled to practice before the Board may charge or accept fees.

Rule 41. Admission to Practice

Any attorney admitted to practice before any court of record of the Commonwealth or of any other state of the United States and in good standing therein may practice before the Board, subject to the following rules:

- (a) The Board reserves the right in any case to inquire into the fees paid to an attorney and, if it deems any fee to be excessive, to direct a reduction thereof.
- (b) Any attorney who refuses to reduce a fee in accordance with the requirement of the Board may not thereafter practice before the Board.

Rule 42. Prosecuting Attorney

District attorneys and assistant district attorneys of any county wherein an applicant was convicted who were in office at any time during and between an applicant's arrest and conviction and who participated in the prosecution of such applicant and any other attorneys in any way participating in the prosecution of an applicant will not be permitted to represent said applicant before the Board for a fee. Any such district attorney, assistant district attorney or other attorney may, however, appear before the Board gratuitously on behalf of such applicant.

V. HEARINGS

Rule 50. Time of Hearings

The Board of Pardons will meet in regular session once each month except during January, July and August.

Rule 51. Place of Hearings

Hearings will be held in Harrisburg at the State Capitol Building, in Philadelphia at City Hall and in Pittsburgh at the City-County Building, except that upon due notice hearings may be held in such other place or places as the Board may designate.

Rule 52. Nature of Hearings

All hearings will be public as required by Article IV, Section 9 (as amended), of the Constitution of Pennsylvania.

Rule 53. Argument

- (a) In all cases except capital cases fifteen minutes will be allowed for the presentation of the plea, and an equal time will be allowed any person or persons opposing the application.
- (b) In capital cases thirty minutes will be allowed the applicant and thirty minutes will be allowed any person or persons opposing the application.

VI. REHEARINGS

Rule 60. Allowance of Rehearing

An application will not be reheard within twelve calendar months of the date of filing unless allowed by the Board upon petition of the applicant or upon its own motion, at least two members voting in favor thereof, and in accordance with such further provisions of Rule 31.

Rule 61. Time and Place of Rehearing

The order allowing a rehearing will state the time and place of rehearing.

Rule 62. Petition for Rehearing and Fee

An applicant may ask for rehearing by filing a petition therefor at any time. He need not file a new application form, and no filing fee will be charged at the time of filing. If the petition is granted, a fee of five dollars will be charged, payable upon notification of the granting of the petition.

Rule 63. Notice of Rehearing

If rehearing of an application is granted, notice thereof will be given, opinion sought and investigation made as set forth in Rule 23 in the case of an original application.

Rule 64. Reasons for Rehearing

A petition for rehearing must set forth new and substantial facts not previously heard by the Board in order to be granted. Facts raising technicalities will not be considered as "new and substantial".

VII. CAPITAL CASES

Rule 70. Definition

A capital case is one in which applicant has requested a commutation of death sentence to life imprisonment.

Rule 71. Filing of Application

An original and five copies of the application in a capital case must be filed with the Secretary of the Board of Pardons, State Capitol, Harrisburg, Pennsylvania.

Rule 72. Filing Fee

No filing fee will be charged in a capital case.

Rule 73. Listings

Applications in capital cases will be listed for hearing at the next regular session of the Board, or at the earliest subsequent session as will allow not less than two weeks for the presentation of exhibits, and further compliance with the provisions set forth in Rules 74-78, inclusive.

Rule 74. Notice of Filing

Notice of intention to apply for clemency in a capital case, together with an exact copy of the application, must be served on (1) the judge who tried the case, or if such judge is deceased, on the president judge of the court in which the case was tried; (2) on the district attorney of the county in which the case arose; (3) on the district attorney or assistant district attorney, if any, who actually tried the case; (4) on any attorney who prosecuted the case privately and (5) on the superintendent, warden or keeper of the local correctional or penal institution wherein the applicant is confined or the Commissioner of Correction if applicant is confined in a state correctional or penal institution. Service of such notice and copies must be made prior to filing the application with the Secretary of the Board; and either an affidavit or proof of service of the required notices must be filed at least five days prior to the date of hearing.

Rule 75. Advertisement

Notice of filing an application for clemency in a capital case must be advertised once a week for two consecutive weeks prior to date of hearing. Such advertisement shall appear in a newspaper of general circulation, printed in the English language, in the county in which the crime occurred and shall state the

true name of the applicant, the name under which he was tried, the crime for which he was convicted, that he was sentenced to death, that he has applied for clemency and the date on which the application will be heard. Proof of publication of the advertisement must be filed with the Secretary of the Board before the date of hearing. Proof shall consist of an affidavit by the publisher of the newspaper, or by his authorized agent, with a copy of the advertisement attached.

Rule 76. Filing of Court Proceedings

If an appeal was taken by an applicant in a capital case he shall file five copies of the record and all paper books and five copies of the court's opinion, if any, with the Secretary of the Board at least five days prior to the date of hearing.

Rule 77. Filing of Other Materials

Any maps, photographs or other materials pertinent to an application in a capital case may be filed with the Secretary of the Board and must be filed at least five days prior to the date of hearing.

Rule 78. Schedule of Papers Filed

A schedule or list of all papers filed with an application in a capital case must be delivered to the Secretary of the Board not later than the date of hearing.

VIII. CONTINUANCES

Rule 80. Granting Continuance

Once an application is listed for hearing, no continuance will be granted except upon motion presented at public hearing of the Board or upon the written request of an applicant or his representative concurred in by the prosecuting attorney.

Rule 81. Fee

If a case is continued in accordance with Rule 80, there shall be no fee for a subsequent listing.

Rule 82. Failure to Appear at Hearing

If an applicant or his representative fails to appear at the time scheduled for the public hearing on the application, the application shall automatically be removed from the list.

Rule 83. Reinstatement

If an application is stricken from the list in accordance with Rule 82, it subsequently may be reinstated upon petition by the applicant or his representative accompanied by a fee of five dollars.

IX. SERVICE AND ADVERTISING

Rule 90. Service by Board

Except in capital cases the Secretary of the Board will transmit a copy of each application filed with him in accordance with Rule 23.

Rule 91. Requests for Information

The Secretary of the Board shall include with the copies to the court and district attorney requests for information and advice from the judge who tried and sentenced the applicant, from the district attorney or assistant district attorney who prosecuted the applicant and from the district attorney in office at the date of the application in accordance with the Act of April 24, 1931, P.L. 71, 71 P.S. Section 299a.

Rule 92. Posting of List

The Secretary of the Board shall post in the office of the Board at Harrisburg two weeks before the public hearing a list of all applications to be heard at the hearing.

Rule 93. Advertising

Except for capital cases the Secretary will, at least one week prior to the public hearing, cause to be published in a newspaper of general circulation in each county where an applicant committed the crime or crimes with respect to which he has applied for clemency a notice stating the true name of the applicant; any other names by which he is known; the crime or crimes with respect to which he has applied for clemency; the institution, if any, in which he is confined and the time and place of the public hearing at which his application will be heard. The publication required by this rule shall be made for every application to be heard by the Board, whether on hearing or rehearing.

X. CALENDAR

Rule 100. Preparation of Calendar

The Secretary of the Board will prepare and cause to have printed a calendar of the cases to be heard by the Board at each public hearing.

Rule 101. Copies Furnished

Copies of the calendar will be sent to each applicant or his representative, to the district attorney of the county from which the applicant was sentenced, to the Commissioner of Correction and to the Board of Probation and Parole.

Rule 102. Call of Calendar

Applications will be heard in the order of their listing on the calendar unless the Board directs otherwise. If there is no answer when a case is called, it will be passed temporarily and then called a second time. If there is no answer when it is called the second time, it will be removed from the list as provided in Rule 82.

XI. PROCEDURAL MATTERS

Rule 110. Depositions

If it becomes necessary to establish by deposition the truth of any disputed fact concerning an application before the Board, such deposition shall be taken according to the rules of the court in whose jurisdiction the deponent may be found. Notice of the taking of a deposition must be served upon the district attorney who received the copy of the application and upon the applicant or his representative.

Rule 111. Witnesses

The Board may request any person, including a present or former district attorney or private prosecutor and any police official, to appear at the public hearing as a witness.

Rule 112. Protests

Any person may appear and be heard at the public hearing in opposition to an application for clemency without notice to the applicant or his representative. A written protest may be filed with the Secretary of the Board at any time.

Rule 113. Other Communications with Board

Any person having knowledge of any fact which might assist the Board in its consideration of a particular application may communicate with the Board by writing to the Secretary of the Board.

Rule 114. Pre-session Discussions

No individual member of the Board shall discuss the issues of any case with any person prior to the final disposition. All inquiries shall be referred to the Secretary for presentation to the Board in Executive Session.

Rule 115. Release Dates

Release dates shall be entered within sixty days subsequent to the Executive Session at which favorable action may be taken by the Board. However, in cases deemed necessary, the Board may recommend a release date at any time.

Rule 116. Photographs

It shall be the responsibility of the applicant to furnish five passport type photographs, 2 1/4" x 3 1/2". Failure to comply will constitute an incomplete application, and a continuance of the hearing will be ordered.

XII. RECOMMENDATIONS BY BOARD

Rule 120. Approval of Application

Three votes in favor of an application for clemency are necessary before the Board can recommend favorable action by the Governor. If such action is recommended, it shall be accompanied by a statement of the Board's reasons for its recommendation.

Rule 121. Actions by Governor

The Governor, in his discretion, may approve or disapprove any favorable recommendation submitted by the Board, and when notice of the Governor's action has been received by the Secretary of the Board, public announcement of the final disposition shall be made as soon as practicable.

Rule 122. Charter and Warrant

If the Board's recommendation is approved by the Governor, the Secretary of the Board shall prepare the proper Charter of Pardon or Warrant of Commutation for the Governor's signature and for the attachment of the Seal of the Commonwealth and the attestation of the Secretary of the Commonwealth.

Rule 123. Public Records

Following the announcement by the Secretary of the Board, in accordance with Rule [2], the reasons of the Board therefor shall be open for public inspection at the office of the Board in Harrisburg and shall be filed with the Lieutenant Governor, Chairman of the Board, and with the General Assembly in accordance with law.

COUNTIES WITHIN THE HEARING DISTRICTS

* * * * *

Eastern District:

Philadelphia	Lehigh
Berks	Montgomery
Bucks	Monroe
Carbon	Northampton
Chester	Pike
Delaware	Wayne

Western District:

Allegheny	Forest
Armstrong	Greene
Beaver	Indiana
Butler	Jefferson
Cambria	Lawrence
Cameron	Mercer
Clarion	McKean
Crawford	Somerset
Clearfield	Venango
Elk	Warren
Erie	Washington
Fayette	Westmoreland

Central District:

Adams	Luzerne
Bedford	Lycoming
Blair	Mifflin
Bradford	Montour
Centre	Northumberland
Clinton	Perry
Columbia	Potter
Cumberland	Schuylkill
Dauphin	Snyder
Franklin	Sullivan
Fulton	Susquehanna
Huntingdon	Tioga
Juniata	Union
Lackawanna	Wyoming
Lebanon	York
Lancaster	

MONTHLY HEARING SCHEDULE

(Note Rule 51)

<i>Month</i>	<i>District</i>	<i>City</i>
February	Eastern	Philadelphia
	Western	Pittsburgh
March	Eastern	Philadelphia
	Central	Harrisburg
April	Eastern	Philadelphia
	Western	Pittsburgh
May	Eastern	Philadelphia
June	Eastern	Philadelphia
	Western	Pittsburgh
	Central	Harrisburg
September	Eastern	Philadelphia
	Western	Pittsburg
	Central	Harrisburg
October	Eastern	Philadelphia
November	Eastern	Philadelphia
	Western	Pittsburgh
December	Eastern	Philadelphia
	Western	Pittsburgh
	Central	Harrisburg

The Board may continue, or provide for additional sessions, as the calendar listings may require.

The dates of the Sessions will be announced in sufficient time prior to each monthly Session.

APPENDIX E

APPENDIX E

SUMMARY OF RESPONSES TO NCCD QUESTIONNAIRE
BY APPLICANTS DENIED COMMUTATION OF MINIMUM SENTENCE
BY THE PENNSYLVANIA BOARD OF PARDONS

HOW DID YOU LEARN THAT YOU COULD APPLY FOR COMMUTATION?

STATE CORRECTIONAL INSTITUTION AT PITTSBURGH

(twelve responses*)

A. From other inmates (5)

"When you spend time in an institution you learn about these things."

B. From attorney (3)

C. From institutional counselor (2)

D. Other (3)

"From reading law books."

"By reading and writing to different agencies."

"I knew it a long time that I could."

Note: When more than one response was given (e.g., "I saw other residents applying
asked my attorney about the possibility of applying."), they are listed separately.

STATE CORRECTIONAL INSTITUTION AT HUNTINGDON

(five responses)

A. From other inmates (3)

B. From attorney (2)

C. From counselor (2)

D. Other (5)

"Through the Legal Committee at the institution."

"By writing to the Attorney General."

"By writing to the Lieutenant Governor."

"Learned from another inmate at SCI Huntingdon, and originally from the chief probation officer of Berks County, Mr. John Dougherty."

"Three different sources, such as other residents."

STATE CORRECTIONAL INSTITUTION AT DALLAS

(Four responses)

A. From other inmates (2)

B. From attorney (1)

C. From institutional counselor (none)

D. Other (1)

"Notification as to how to apply is posted in cell block."

STATE CORRECTIONAL INSTITUTION AT GRATERFORD

(Ten responses)

A. From other inmates (6)

B. From attorney (none)

C. From institutional counselor (3)

"From institution workers."

"Through counselors at Eastern State Penitentiary."

"From the Director of Treatment at Eastern State Penitentiary."

D. Other (1)

"By reading the bulletin board at Graterford."

STATE CORRECTIONAL INSTITUTION AT ROCKVIEW

five responses)

A. From other inmates (4)

"Through word of mouth of other inmates because it was one of the first things I heard about when I came to jail."

"I heard other guys (inmates) talking about it. I decided to find out more about it by asking around."

"Through an inmate at Western Penn."

B. From attorney (1)

"I don't know. It's one of those things you run into in jail. My attorney mentioned it once right after I was sentenced. Inmates talk about it all the time."

C. From institutional counselor (1)

"I always thought commutation was for lifers. My counselor thought I had a good chance to make it. I thought it was worth a try, even though I felt I would be turned down."

D. Other (none)

STATE CORRECTIONAL INSTITUTION AT CAMP HILL

five responses)

A. From other inmates (3)

B. From attorney (1)

C. From institutional counselor (2)

"William Berg, Bureau of Corrections Commutation Specialist, called me into his office and advised me that I could apply for commutation."

D. Other (none)

D.C. PHILADELPHIA

One response)

"Literature and conversation with other inmates."

ALL INSTITUTIONS

(Forty-six responses)

- A. From other inmates (24)
- B. From attorney (8)
- C. From institutional counselor (10)
- D. Other (11)

2. WERE INSTITUTIONAL OFFICIALS HELPFUL IN OBTAINING FORMS AND ASSISTING YOU IN FILLING OUT YOUR APPLICATION?

STATE CORRECTIONAL INSTITUTION AT PITTSBURGH

(Eleven responses*)

- A. Yes (3)

"Had no problems."

- B. No (4)

"I filled them out myself."

"Not at all. Other residents gave me the address; I filled out and sent the form myself."

"Partly I filled out the forms myself; the institution helped me by their recommendation."

- C. Received help from Legal Aid Committee or Inmate Law Clinic (none)

- D. Officials gave Board of Pardons address only (2)

- E. Attorney handled application (2)

"My lawyer handled all of the proceedings. I received no help from institution officials."

"The staff didn't have anything to do with the application because my attorney did everything."

STATE CORRECTIONAL INSTITUTION AT HUNTINGDON

(Ten responses*)

A. Yes (3)

"My counselor assisted me in filling out my application."

B. No (2)

"I had some questions but no one seemed to know anything about it."

C. Received help from Legal Aid Committee or Inmate Law Clinic (3)

D. Officials gave Board of Pardons address only (1)

"I did it all myself but my counselor obtained the address for me."

E. Attorney handled application (1)

Note: One inmate who learned of the possibility of commutation from a counselor at SCIPGH did not actually apply until after transfer to SCIH.

EASTERN STATE CORRECTIONAL INSTITUTION AT DALLAS

(Our responses)

A. Yes (none)

B. No (1)

"Another inmate helped me fill out the forms."

C. Received help from Legal Aid Committee or Inmate Law Clinic (2)

D. Officials gave Board of Pardons address only (none)

E. Attorney handled application (1)

EASTERN STATE CORRECTIONAL INSTITUTION AT GRATERFORD

(In responses)

A. Yes (1)

"The Director of Treatment at Eastern State helped me out."

B. No (6)

"I did it on my own."

"I sent for them myself and filled them out by myself. I did not seek help."

"Counselors do not know anything about the procedure."

"I did not need them."

"The counselors were no help."

C. Received help from Legal Aid Committee or Inmate Law Clinic (3)

"The Inmate Law Clinic helped me fill out the application. In fact, one counselor hurt me rather than helping me."

"The law clinic assisted me as the counselors do not know anything."

D. Officials gave Board of Pardons address only (none)

E. Attorney handled application (none)

STATE CORRECTIONAL INSTITUTION AT ROCKVIEW

(Five responses)

A. Yes (2)

"I got the fullest cooperation. I got the address from my counselor. I wrote for the papers myself but he helped me fill them out."

"I believe I have the full cooperation from the institution and the backing of the institution. They were helpful."

B. No (1)

"I received no help from the institution. I got the forms by asking an inmate to fill out the order form and send it to the Board. An inmate helped me fill out the application, too."

C. Received help from Legal Aid Committee or Inmate Law Clinic (none)

D. Officials gave the Board of Pardons address only (2)

E. Attorney handled application (none)

STATE CORRECTIONAL INSTITUTION AT CAMP HILL

(Five responses)

A. Yes (4)

"In general, yes."

B. No (1)

C. Received help from Legal Aid Committee (none)

D. Officials gave Board of Pardons address only (none)

E. Attorney handled application (none)

D.T.C. PHILADELPHIA

(One response)

A. Yes (1)

B. No (none)

C. Received help from Legal Aid Committee or Inmate Law Clinic (none)

D. Officials gave Board of Pardons address only (none)

E. Attorney handled application (none)

ALL INSTITUTIONS

(Forty-six responses)

A. Yes (14)

B. No (15)

C. Received help from Legal Aid Committee or Inmate Law Clinic (8)

D. Officials gave Board of Pardons address only (5)

E. Attorney handled application (4)

DID YOU PAY THE FILING FEE? (If not, was obtaining a Pauper's Affidavit difficult?)

A. Yes (45)

B. No (1)

"Yes, I paid \$17.50."

"My parents paid the fee."

"I paid the filing fee myself and the fee of \$2.00 for having them typed by an inmate."

"I obtained a Pauper's Affidavit but had some difficulty in obtaining the form."

"One resident stated that he paid the fee but added, 'I received an affidavit with my application.'"

NOTE: The following two questions were asked to determine two important things: whether, in the case of those represented by Pardons Board Specialists, the applicants even knew who had represented them and, in all cases, whether applicants received any feedback on the quality of their representation. In addition, we have taken the liberty of including for purposes of comparison a breakdown on the representation of those whose minimum sentences were commuted during the same calendar period.

4. WHO REPRESENTED YOU AT THE HEARING?

<u>INSTITUTION</u> (Granted/Denied)	<u>A. ATTORNEY</u> (Granted/Denied)	<u>B. PARDONS CASE SPECIALIST</u> (Granted/Denied)	<u>C. CLERGYMAN</u> (Granted/Denied)	<u>D. OTHER</u> (Granted/Denied)
<u>SCI - PITTSBURGH</u>				
(6/11)	(4/6)	(2/4)	(none/1)	(none/none)
<u>SCI - HUNTINGDON</u>				
(2/10)	(2/2)	(none/6)	(none/2)	(none/none)
<u>SCI - DALLAS</u>				
(3/4)	(3/1)	(none/1)	(none/1)	(none/1)
<u>SCI - GRATERFORD</u>				
(5/10)	(2/2)	(2/7)	(none/1)	(1/none)
<u>SCI - ROCKVIEW</u>				
(4/5)	(1/none)	(3/4)	(none/none)	(none/1)
<u>SCI- CAMP HILL</u>				
(none/5)	(none/1)	(none/4)	(none/none)	(none/none)
<u>C.T.C. PHILADELPHIA</u>				
(none/1)	(none/none)	(none/1)	(none/none)	(none/none)
<u>ALL INSTITUTIONS</u>				
(20/46)	(12/12)	(7/27)	(none/5)	(1/2)

Additional comments of those represented by Pardons Case Specialists:

.. Mr. Conrad (8; 6 from Graterford)

"Mr. Berg said that he would represent me personally. I received a form letter later saying that a Mr. Conway represented me."

. Mr. Wilson (1; SCIH)

. Mr. Bayne (1; SCIR)

. Mr. Davis (1; SCIG)

. Other (16)

"Represented by the Pardon Board Attorney."

"A Mr. Ira Wilson was supposed to but he didn't. Another person did from the Western District -- a counselor, I believe, from the Pittsburgh Institution."

"All I know is the man was from Delaware County. He took care of it."

"A public defender from my district -- Eastern District."

"I forget his name. It was supposed to be a Mr. Ira Wilson, but he was replaced ... I think."

Explanation of those applicants whose representation is described as "Other":

1. He was represented but does not know the "attorney's" name.

(The same respondent stated that if he had had "a private attorney", he "might have had a better chance.")

2. "My home town preacher was supposed to represent me at the hearing but he couldn't make it. I don't know if anybody represented me. I've never been told."

5. DO YOU THINK YOU WERE ADEQUATELY REPRESENTED AT THE HEARING?

A. Yes (24)

B. No (12)

C. Don't know (10)

Represented by attorney:

- A. Yes (10)
- B. No (1)
- C. Don't know (1)

Represented by Pardon Case Specialist:

- A. Yes (11)

"I have no reason to think otherwise." (Conrad)

"I think very much so, because Mr. Wilson knew my case when he was my counselor and appeared to strongly support me. He made a visit before the hearing in order to get facts to build my case."

"Probably the best that could have been," (Bayne)

"My wife assured me that I was well represented at the hearing." (Wilson)

"Yes, but I was not interviewed by the representative prior to my hearing."

"My mother was there and she said the case was presented fully. According to her, everything was in order. She spoke in my behalf."

"Yes, sir."

- B. No (8)

"They did not let my people know anything about the hearing and Mr. Conrad did not know enough about me."

"When one person represents too many people, he cannot represent anyone adequately." (Conrad)

"No. Representation was too general. I feel that the one going before the Board should be allowed to appear in his own behalf." (Conrad)

"I only saw the Pardon Board representative one time. How could he know my case and adequately represent my case?"

"Misrepresented because D.A. made statements overstating offenses."

"No, because I was not interviewed before the hearing, nor was any of my correspondence answered by the representative of the Bureau of Correction."

C. Don't know (8)

"I cannot answer as I was not there. I believe my own lawyer could have done better." (Conrad)

"I don't know because I don't know what went on."

"I don't know because I was not there." (Davis)

"I can't answer this question because I wasn't at the hearing and I don't know if anybody represented me or not. All I know is I was turned down."

"It is unknown to me personally because I could not attend the hearing."

"I have no way of knowing."

"I don't know, I wasn't there. I would have liked to have been there, though. That is all I can say."

Represented by clergyman:

A. Yes (3)

B. No (1)

"I could have had more help. More of my friends could have shown up."

C. Don't know (1)

"I have no idea."

Represented by those listed as "Other":

A. Yes (none)

B. No (2)

"No, because I had no talk with anyone who represented me."

C. Don't know (none)

All respondents:

A. Yes (24)

B. No (12)

C. Don't know (10)

6. HOW WERE YOU NOTIFIED THAT YOUR APPLICATION FOR CLEMENCY WAS DENIED?

SCIPGH

- A. Letter from (or forwarded by) representative (5)

"My attorney sent me a letter four months after the hearing. I didn't get any other notification."

"Seventy days after the Pardon Board hearing, my lawyer wrote to the Pardon Board and got a letter informing him of the denial. Too long."

- B. By institution official (3)

"Mr Conrad." (2 responses)

"It's been seven months -- four and a half since I was told by the Director of Treatment. That's too long a time for notification."

- C. Not notified to date* (1)

- D. Other (2)

"The Lieutenant Governor wrote me a letter,"

"Another resident told me. That's a hell of a thing, that another resident knows before you do."

SCIH

- A. Letter from (or forwarded by) representative (none)

- B. By institution official (4)

"By my counselor." (4 responses)

- C. Not notified to date* (4)

- D. Other (2)

"I wrote a letter to the Lieutenant Governor who in turn referred it to the Attorney General's office, who advised me of the results of my hearing."

"I wasn't notified; after four months I had to write to Mr. Gillingham's secretary of the Board of Pardons who advised that my petition for clemency was denied and that the Bureau of Corrections was notified approximately one month prior to that date."

SID

- A. Letter from (or forwarded by) representative (1)
- B. By institution official (3)

"I was called over to the clinic and signed a slip that application to the Pardon Board was denied." (3 responses)

- C. Not notified to date* (none)
- D. Other (none)

SIG

- A. Letter from (or forwarded by) representative (1)
- B. By institution official (9)

"Through Mr. Conrad." (8 responses)

"My social worker told me."

"I had to run Mr. Conrad down and catch him in the hallway."

"I did not get any notice in writing of the results."

- C. Not notified to date* (none)
- D. Other (none)

IC

- A. Letter from (or forwarded by) representative (none)
- B. By institution official (5)

"Through Dr. Belford."

"From counselor."

"Director of Treatment."

"Through teletype from the staff."

"I was told by Dr. Truxall about two weeks before my hearing date that I would make it. I was told by my counselor after the decision that I did not make it. Dr. Belford told me at my release. I never received anything in writing."

C. Not notified to date* (none)

D. Other (none)

SCIR

A. Letter from (or forwarded by) representative (none)

B. By institution official (5)

"Notified by Dr. Bingaman, Director of Treatment." (5 responses)

"I was notified by Dr. Bingaman, Mr. Bayne and Mr. Benecke, staff members at this institution."

C. Not notified to date* (none)

D. Other (none)

C.T.C. PHILA.

A. Letter from (or forwarded by) representative (none)

B. By institution official (none)

C. Not notified to date* (1)

D. Other (none)

ALL INSTITUTIONS

A. Letter from (or forwarded by) representative (7)

B. By institution official (29)

C. Not notified to date* (6)

D. Other (4)

7. *WOULD AN EXPLANATION FOR THE DENIAL MAKE THE DECISION MORE ACCEPTABLE TO YOU?*

A. Yes (38)

"I would always like to know one way or another."

"Sure it would."

*Note: Of the six who had not yet been notified at the time of the survey, two each were represented by private attorneys, Pardons Case Specialists and clergymen. Three had been waiting four months, one four and a half months, one five and a half months, and one six and a half months for notification.

"Definitely."

"I was not at the hearing so I want to know the reasons."

"You would know what to strive for. If you keep being denied you don't know what to do."

"I would know where he's at."

"Yes, it would help me but the notification period is too long."

"Yes, I know I went up early but an explanation would aid in preparing when reapplying at a later date."

"Yes, definitely. I think this is a very important point."

"Yes, because now I know nothing about what went on."

"Yes, as it would clear things up."

"Yes, I would like to know why I was refused as my record is perfectly clean."

"Yes, if they would tell you why they turned me down I could do something about it."

"Yes, because if I'm doing something wrong I could correct it."

"Most certainly."

"I think it would be the best thing. I don't know why I was turned down and I would like to know their reason."

"I would like to know the reason why. It would aid other inmates as well as myself."

"It would help a whole lot."

"I don't understand or see any reason for the denial except for the time element." (i.e., length of sentence). "If they said something about my behavior or something else I could work on that."

"I think it would. I would like to know the reason why since I've been trying to better myself. I have really tried."

"Yes, but notification should be returned faster."

B. No (2)

"No, I was refused."

"I realized when I applied that there was no chance mainly because the judge was extremely adamant against my release on furloughs. Then I realized it would not go through in time anyway before my wife died."

C. Other (6)

"I cannot answer."

"I received an explanation for the denial from my mother."

"I received an explanation from my attorney."

"I don't know what decision was made." (3 responses)

8. DO YOU FEEL YOU WERE TREATED FAIRLY? (If not, why not?)

Represented by attorney:

A. Yes (3)

"Yes, but the circumstances surrounding my arrest should be thoroughly investigated."

"Yes, but they should have reviewed the case a little deeper. Both the circumstances of the case and the fact that I was on bond for three years without getting into trouble."

B. No (6)

"No, my accomplice applied for commutation at the same time and was accepted and is now free. I am the victim of politics."

"The charges are listed wrong in that I was charged with involuntary manslaughter and the Pardon Board was told the charge was voluntary manslaughter while under the influence of drugs."

"All my co-defendants on the same offense are on the street."

"No, the Board doesn't consider short-timers. Commutation should be for short-timers also."

"I had the institution's recommendation and no opposition. I should have made it. I wish I had some reason for the denial. Other residents with greater offenses and less progress are making it. Also, give me the answer right away. Call me out and give me the news, good or bad. Don't let me hang."

C. Don't know or cannot answer (3)

"I can't answer this because I don't know the reason why I was turned down." (2 responses)

"No idea except for faith in my attorney. I don't know what happened because I wasn't at the hearing. I would have liked to have been present regardless of the outcome."

Represented by Pardons Case Specialist:

A. Yes (5)

"Yes, in fact I was told that my hearing date was moved up because of my wife's condition."

"Yes, although I should have made my commutation."

B. No (15)

"I just was not treated fairly."

"No, because I was denied."

"No. This is about a year and I've never been notified."

"As far as the decision goes, I don't think so. I don't think I received recognition for everything I've accomplished -- that is, changes in my behavior, attitude, and so on. When a person really puts forth his best, they still consider the time factor as the bad feature. After a good adjustment over a period of years a person could go the other way or stop trying to better himself."

"No. My record should have spoken for itself."

"No, because of my institutional record being as it was and the psychological tests I have taken and apparently passed. I feel that no exception was taken to these. I feel I met the criteria for consideration and was probably denied either from objections by the judge and the D.A. or from being in the community treatment center."

"I should have been there to explain my case."

"Too much emphasis is placed on minor misconducts instead of psychological reports and the basis for the request."

"No. I was not interviewed for the hearing and so the circumstances of my case and the record of charges were not accurately represented."

"No. I feel I should have been granted because this was my first arrest and because of my good institution record."

"No, because I didn't get an explanation. I want to know the basis for granting commutation. The Board should set very definite standards and guidelines and then publicize them so that the residents will know their guidelines."

"The staff recommendation should carry the most weight because they know you best. I have a bad sentence (25-75 years) and have constantly been highly recommended by the staff and have done as much time as a lot of lifers. I think I've made a good adjustment but the Pardon Board won't let me return to the community."

"I don't know how they decided. I don't know why they don't go by the recommendation of the institution. They (the institution) recommended me for commutation. I think the judge is holding me back and there is too much power in the Commute Board."

C. Don't know or cannot answer (7)

"I don't know. I'm still waiting for an answer."

"I wasn't there to know what really happened. My counselor told me. My wife told me Mr. Bayne spoke well of me and my betterment of myself. I think if a man is doing time in an institution and proves he is bettering himself, he should be given another chance."

"I don't know because I do not know why I was turned down."

"Without an explanation as to why I was refused I cannot answer."

"In a way, I do and in a way I don't. I think my sentence was lenient but the Board was very unfair in considering my home conditions." (The resident said his stepfather had died the night before and his mother was very depressed at the hearing.) "I did wrong, but I thought since this was the first time I had trouble with the law, I would receive more leniency. The Board gave no consideration for my ex-wife's opinion at the hearing either."

"I do not know. It was up to them."

Represented by clergymen:

A. Yes (2)

B. No (none)

C. Don't know or cannot answer (3)

"I feel that I could have been treated more fairly if I was there. If someone from the Board would come to the institution and explain the turn-down it would be more helpful."

"I have no idea."

Represented by those described as "Other":

A. Yes (1)

"I have no complaints about the way I was treated."

B. No (none)

C. Don't know or cannot answer (1)

"This is a hidden board; I would like to go before it myself. It costs to file for commutation. Someone else represents me and I don't know what is going on."

All Respondents:

- A. Yes (11)
- B. No (21)
- C. Don't know or cannot answer (14)

APPENDIX F

APPENDIX F

SUMMARY OF RESPONSES FROM THOSE DENIED PARDONS

SEPTEMBER - DECEMBER, 1972

HOW WERE YOU NOTIFIED THAT YOUR PETITION FOR PARDON HAD BEEN DENIED?

- RESPONDENT A: "By letter. I asked why, but they told me they didn't have to give any reasons."
- RESPONDENT B: "My lawyer told me."
- RESPONDENT C: "I got a letter." December 15.
- RESPONDENT D: Letter. Attorney also got a copy.
- RESPONDENT E: Letter
- RESPONDENT F: Letter from lawyer

DO YOU THINK THE DECISION WAS FAIR AND JUST? WHY?

- RESPONDENT A: No. "When a person has paid for his crime, I think that should be it. When you're wrong, you're wrong; I'm not contesting that. But, I mean, they're giving pardons to felons -- why not me?"
- RESPONDENT B: "Well, no. I mean, I was very young at that time. Now I'm running a good business. I can't see why they wouldn't have given it to me, you know?"
- RESPONDENT : No. "I'll have been out ten years in June, and I've had a clean record."
- RESPONDENT D: No. "I guess my lawyer wasn't important enough."
- RESPONDENT E: "When you're on the defensive, what can you say?" [His representative, Father Conoughton, had a heart attack and since the applicant himself received no notification of the hearing date, he had to rush down to City Hall when his wife happened to call and learned that the session was already in progress. Thus, he went before the Board practically unprepared and certainly unnerved.]

RESPONDENT F: "No, I think I should have gotten it." Angry at questions from Dr. Biele about not having gone for psychiatric help: "If I'd gone, the psychiatrist would have thought I was crazy." He feels Biele was the reason for denial. "It seemed like kind of funny goings-on."

3. WOULD AN EXPLANATION FOR THE DENIAL HELP YOU TO ACCEPT THE SITUATION?

RESPONDENT A: No. Unfair.

RESPONDENT B: "No, I figured they knew what they were doing. I mean, I don't know the law . . . But I didn't cut anyone or anything."

RESPONDENT C: Yes. "Conjecture's no satisfaction."

RESPONDENT D: "Of course!"

RESPONDENT E: Called Gillingham and asked what the reasons were. "I wanted to know what obstacles should be overcome." Speculates that Attorney General Creamer, who apparently cross-examined him extensively about his record (long list of charges for lottery and poolselling), was responsible for the denial. "I know nothing more than I did when I began."

RESPONDENT F: "It might, if it was a good reason. I can't think of one, but you know."

4. HOW MUCH DID THE APPLICATION COST YOU IN TERMS OF:

- a. APPLICATION FORMS?
- b. ATTORNEY'S FEES?
- c. TRANSPORTATION?
- d. ABSENCE FROM WORK?
- e. ETC.

RESPONDENT A: "I took a day off from work. I couldn't afford a lawyer." \$2.00 for forms, \$15.00 filing fee.

RESPONDENT B: \$220 total

RESPONDENT C: "I didn't have an attorney. I didn't feel I needed one or that it would help. An attorney only has a financial motive, after all." \$17.00 forms and filing. "I took a day off -- that's \$52.00 gross. I only live eighteen miles away, so transportation didn't amount to anything."

RESPONDENT D: Attorney: \$350; about \$450 personal, "with my time, the forms, and transportation down for my witnesses and so on."

RESPONDENT E: "I had Representative Green's lawyer fill out the forms for me. With that and the \$17.00 for the forms and the calls to Harrisburg and transportation down there, I'd say it came to at least \$100.

RESPONDENT F: \$250 for lawyer. No work missed. Lawyer paid for forms out of his fee. \$6.00 for pictures.

WILL YOU RE-APPLY? WHY?

RESPONDENT A: No. Can't afford it, and it's useless anyway. "They won't give me any reason, so why bother?"

RESPONDENT B: Has already re-applied.

RESPONDENT C: "I might re-apply. They've got a new Attorney General now. The old one was hot on gun control, and I figure maybe that's why I didn't get it."

RESPONDENT D: "I intend to re-apply. I applied originally because I wanted to clear the record. I was working in a department store and my employers promised to recommend me for the management trainee program if I could get it cleared up." (Note: NCCD researcher reports, "Respondent D was initially very defensive about who I was, how I got his phone number, why he should talk to me, etc.; but once he began talking, I couldn't shut him off. Among other things, he said that his lawyer, the public defender who had represented him at his original hearing, told him that applying for a pardon 'might cost several thousand dollars'. Only three members sat at his hearing, and his lawyer told him that they would consult with the others before voting. He has married a girl with money, and I gather is working for her father and now has a substantial income. He intends to re-apply indefinitely, no matter what the cost, until he secures his pardon.")

RESPONDENT E: "Definitely, yes." Has a large family and a low income and says that his record makes it difficult to find a better job.

RESPONDENT F: "I don't know. If I ever get the money I might. Maybe my boss could help. He's in with the Governor." Wants pardon so he can join the police force.

Note: Applicants almost universally expressed the opinion that with enough money or the right connections, anyone could get a pardon.

APPENDIX G

APPENDIX G

ANALYSIS OF ACTIONS OF THE BOARD OF PARDONS

ANALYSIS OF ACTIONS BY THE BOARD OF PARDONS IN SELECTED CATEGORIES FOR CALENDAR YEAR 1972 (P. G-2)

This chart presents a breakdown into somewhat arbitrary categories of Board of Pardons actions for 1972. All types of clemency are included. Each applicant is listed only once, according to the crime deemed most "serious". (Thus, a murderer who was also convicted of arson or robbery is listed in the first category, a rapist-burglar only under "rape", etc.

Such meager conclusions as may be drawn from this data are readily apparent, if often somewhat inexplicable. The chart was prepared by our researcher, who felt that since there was insufficient time for him to do a thorough evaluation based on reference to each file, and since the offense notations in the Board of Pardons Calendar were, by themselves, misleading, the best course would be to simply attempt to indicate the kinds of statistical feedback Board members should be receiving. We include the chart primarily for that purpose.

Also included in this appendix are the "Analysis of Action" charts for 1967-1972 prepared by the Secretary of the Board of Pardons, Mr. Gerald A. Gillingham and additional extrapolations from this data by Board of Pardons and NCCD staffs.

APPENDIX G

ANALYSIS OF ACTIONS BY THE BOARD OF PARDONS IN SELECTED CATEGORIES FOR CALENDAR YEAR 1972

Total applications listed for hearing	389
Applications continued or passed	25
Total applications heard by the Board	364
Held Under Advisement	1

	<u>Heard</u>	<u>Recommended</u>	<u>Denied</u>	<u>Denied By Governor</u>
A. Violent Crimes				
1. Murder	153	57	96	1
2. Rape	21	1	20	1
3. Other (Manslaughter, A&B, assault w/i to kill, assault w/i to rape, etc.)	36	5	31	-
B. Property Crimes				
1. Arson	5	-	5	-
2. Robbery	31	16	15	-
3. Other (Larceny, burglary, RSG, forgery, att. burglary, etc.)	65	25	40	-
C. "Victimless" Crimes				
1. Non-violent sex crimes	10	3	7	-
2. Illegal lottery, gambling, poolselling, bookmaking	10	7	3	-
3. Drugs	11	3	8	1
D. Other Crimes (VLL, VMVC, prison breach, etc.)	<u>21</u>	<u>12</u>	<u>9</u>	<u>-</u>
TOTALS	<u>363</u>	<u>129</u>	<u>234</u>	<u>3</u>

ANALYSIS OF THE ACTION OF
THE BOARD OF PARDONS SESSIONS
FOR THE CALENDAR YEAR 1967

total applications listed for hearing on the calendar	410
applications continued for non-appearance of the applicant's representative or on motion of the applicant	53
total applications heard by the Board	356

Petitions

	Listed	Contd., Passed, etc.	Heard	Granted	Refused	Held Under Adv.
Petition for commutation of death penalty to imprisonment for life						
Petitions for commutation of minimum sentence to make applicant eligible for release after parole by the Board of Parole	206	23	183	$\frac{13}{5.5\%}$	$\frac{167}{91\%}$	$\frac{2}{3.5\%}$
Petitions for commutation of life sentence to make applicant eligible for release after parole by Board of Parole	108	10	99	$\frac{25}{23\%}$	$\frac{69}{66.7\%}$	$\frac{5}{10.3\%}$
Petitions for commutation of maximum sentence of applicants now on parole	19	1	18	$\frac{2}{11\%}$	$\frac{16}{89\%}$	0
Petitions for pardons by persons not presently serving prison sentence including those previously released on parole and also those who never received prison sentences, for purpose of clearing record, etc.	77	20	57	$\frac{27}{47\%}$	$\frac{27}{47\%}$	$\frac{3}{6\%}$
Total	410	53	356	67	279	10

ANALYSIS OF THE ACTION OF
THE BOARD OF PARDONS SESSIONS
FOR THE CALENDAR YEAR 1968

Total applications listed for hearing on the calendar 3

Applications continued for non-appearance of the applicant's representative or on motion of the applicant

Total applications heard by the Board 28

Petitions

	Listed	Contd., Passed, etc.	Heard	Granted	Refused	Held Under Adv.
Petition for commutation of death penalty to imprisonment for life						
Petitions for commutation of minimum sentence to make applicant eligible for release after parole by the Board of Parole	145	10	135	$\frac{9}{6\%}$	$\frac{126}{94\%}$	0
Petitions for commutation of life sentence to make applicant eligible for release after parole by Board of Parole	87	5	82	$\frac{21}{26\%}$	$\frac{61}{74\%}$	0
Petitions for commutation of maximum sentence of applicants now on parole	17	3	14	$\frac{4}{28.5\%}$	$\frac{10}{71.5\%}$	0
Petitions for pardons by persons not presently serving any prison sentence including those previously released on parole and also those who never received prison sentences, for purpose of clearing record, etc.	75	24	51	$\frac{26}{51\%}$	$\frac{25}{49\%}$	0
Total	324	42	282	60	222	0

ANALYSIS OF THE ACTION OF
THE BOARD OF PARDONS SESSIONS
FOR THE CALENDAR YEAR 1969

Total applications listed for hearing on the calendar	349
Applications continued for non-appearance of the applicant's representative or on motion of the applicant	52
Total applications heard by the Board	297

Petitions

	Listed	Contd., Passed, etc.	Heard	Granted	Refused	Held Under Adv.
Petition for commutation of death penalty to imprisonment for life						
Petitions for commutation of minimum sentence to make applicant eligible for release after parole by the Board of Parole	153	19	134	$\frac{10}{7\%}$	$\frac{124}{93\%}$	0
Petitions for commutation of life sentences to make applicant eligible for release after parole by Board of Parole	88	7	81	$\frac{17}{21\%}$	$\frac{59}{73\%}$	$\frac{5}{6\%}$
Petitions for commutation of maximum sentence of applicants now on parole	12	4	8	0	$\frac{8}{100\%}$	0
Petitions for pardons by persons not presently serving any prison sentence including those previously released on parole and also those who never received prison sentences, for purpose of clearing record, etc.	96	22	74	$\frac{46}{62\%}$	$\frac{28}{38\%}$	0
Total	349	52	297	73	219	5

ANALYSIS OF THE ACTION OF
THE BOARD OF PARDONS SESSIONS
FOR THE CALENDAR YEAR 1970

Total applications listed for hearing on the calendar 3

Applications continued for non-appearance of the applicant's representative or on motion of the applicant

Total applications heard by the Board 3

Petitions

	Listed	Contd., Passed, etc.	Heard	Granted	Refused	Help Unde Adv
Petition for commutation of death penalty to imprisonment for life						
Petitions for commutation of minimum sentence to make applicant eligible for release after parole by the Board of Parole	174	13	161	$\frac{11}{7\%}$	$\frac{150}{93\%}$	0
Petitions for commutation of life sentence to make applicant eligible for release after parole by Board of Parole	110	9	101	$\frac{31}{31\%}$	$\frac{68}{67\%}$	$\frac{2}{2\%}$
Petitions for commutation of maximum sentence of applicants now on parole	13	7	6	$\frac{2}{33 \frac{1}{3}\%}$	$\frac{4}{66 \frac{2}{3}\%}$	0
Petitions for pardons by persons not presently serving any prison sentence including those previously released on parole and also those who never received prison sentences, for purpose of clearing record, etc.	70	11	59	$\frac{37}{63\%}$	$\frac{20}{34\%}$	$\frac{2}{3\%}$
Total	367	40	327	81	242	4

APPENDIX G

ANALYSIS OF THE ACTION OF
THE BOARD OF PARDONS SESSIONS
FOR THE CALENDAR YEAR 1971

all applications listed for hearing on the calendar	483
Applications continued for non-appearance of the applicant's representative or on motion of the applicant	28
all applications heard by the Board	455

Petitions

	Listed	Contd., Passed, etc.	Heard	Granted	Refused	Held Under Adv.
Petition for commutation of death penalty to imprisonment for life						
Petitions for commutation of maximum sentence to make applicant eligible for release after parole by the Board of Parole	256	15	241	$\frac{47}{19.5\%}$	$\frac{187}{77.5\%}$	$\frac{7}{3\%}$
Petitions for commutation of life sentence to make applicant eligible for release after parole by Board of Parole	128	5	123	$\frac{48}{39\%}$	$\frac{65}{52\%}$	$\frac{10}{9\%}$
Petitions for commutation of maximum sentence of applicant now on parole	21	1	20	$\frac{5}{25\%}$	$\frac{13}{65\%}$	$\frac{2}{10\%}$
Petitions for pardons by persons not presently serving a prison sentence including those previously released on parole and also those who never received prison sentences, for purpose of clearing record, etc.	78	7	71	$\frac{41}{58\%}$	$\frac{27}{38\%}$	$\frac{3}{4\%}$
Total	483	28	455	141	292	22

ANALYSIS OF THE ACTION OF
THE BOARD OF PARDONS SESSIONS
FOR THE CALENDAR YEAR 1972

Total applications listed for hearing on the calendar 3

Applications continued for non-appearance of the applicant's representative or on motion of the applicant

Total applications heard by the Board 3

Petitions

	Listed	Contd., Passed, etc.	Heard	Recom- mended	Denied	Held Under Adv.	Deni- By Gov.
Petitions for commutation of death penalty to imprisonment for life							
Petitions for commutation of minimum sentence to make applicant eligible for release after parole by the Board of Parole	165	7	158	$\frac{33}{20.1\%}$	$\frac{124}{79\%}$	$\frac{1}{1\%}$	2
Petitions for commutation of life sentence to make applicant eligible for release after parole by Board of Parole	126	4	122	$\frac{51}{42\%}$	$\frac{71}{58\%}$	0	1
Petitions for commutation of maximum sentence of applicants now on parole	9	3	6	0	$\frac{6}{100\%}$	0	
Petitions for pardons by persons not presently serving any prison sentence including those previously released on parole and also those who never received prison sentences, for purpose of clearing record, etc.	89	11	78	$\frac{45}{58\%}$	$\frac{33}{42\%}$	0	
<u>Total</u>	389	25	364	$\frac{129}{35\%}$	$\frac{234}{64\%}$	$\frac{1}{1\%}$	3
<u>Total Granted</u>	$\frac{126}{34\%}$						
<u>Total Denied</u>				$\frac{237}{65\%}$			
Special commutation of maximum sentences recommended by Board of Parole	81	0	81	71	10	0	4
<u>Total Granted</u>	$\frac{67}{83\%}$						
<u>Total Denied</u>				$\frac{14}{17\%}$			

APPENDIX H

COMMONWEALTH OF PENNSYLVANIA



DEPARTMENT OF JUSTICE

BOARD OF PARDONS

HARRISBURG, PA. 17120

March 8, 1973

In Re:

Dear Representative:

The Board of Pardons carefully considered the above
named application at the Session
of the Board, and I am authorized to inform you that the
Board has recommended it be

Very truly yours,

Secretary



DEPARTMENT OF JUSTICE
BOARD OF PARDONS
HARRISBURG, PA. 17120

In reply to your letter of recent date, whereby you are requesting reasons for the refusal of your commutation, we are sorry to inform you that the Board of Pardons is not required to give reasons for the action of refusal. We are only required to give reasons when we recommend clemency to the Governor for his approval.

If we may be of any further service, please feel free to contact us.

Very truly yours,

Gerald A. Gillingham, Secretary
Board of Pardons

GAG:par

APPENDIX I

APPENDIX I

MODEL SENTENCING ACT

Second Edition

COUNCIL OF JUDGES
OF THE
NATIONAL COUNCIL ON CRIME AND DELINQUENCY

Copyright 1972

National Council on Crime and Delinquency

Foreword to the Second Edition

ALL OF US at the National Council on Crime and Delinquency share the pride of our Council of Judges in having produced the first edition of the Model Sentencing Act in 1963 and now the revised edition. This revision overcomes in important ways some faults of the first edition and adds some important new features.

The contribution of the Model Sentencing Act to date cannot be measured only by the passage of legislation or by its influence on other standards, particularly the American Bar Association's standards on sentencing. Even more basic is the way it has advanced the view of sentencing beyond what existed before in any jurisdiction. It establishes a rational rather than a fictional concept of the dangerous offender. Concomitant with that innovation is the equally important concept of the nondangerous offender, with important implications for sentencing and correctional treatment. Here at last is an act that strengthens individualized sentencing of the dangerous offender while, at the same time, establishing a large category of nondangerous offenders for whom probation or some other noninstitutional sentence is most suitable. Both society and the offender can only gain from this.

For four years no prisoner was executed despite the imposition of the death sentence by judges. In February 1972 the Supreme Court of California and in June the Supreme Court of the United States held the death penalty, as presently administered, to be unconstitutional as cruel and unusual punishment. Both the Council of Judges and NCCD have long stood for abolition.

Considering the great need for prison reform, we hope that legislative enactments will go even further than the proposals in the second edition of the MSA. Having established a carefully studied distinction between dangerous and nondangerous offenders, we must now question why prison terms of up to five years should be authorized for the latter. Why need we imprison any nondangerous offender? It is time to propose the virtual abolition of imprisonment for nondangerous offenders in behalf of a great expansion of innovative probation and other community noninstitutional correction programs. Undoubtedly, small institutions are, in general, better than large ones, but we do not need, as some have proposed, a vast proliferation of small institutions. The response by law and the criminal justice community to the call for prison reform must oppose new prison construction.

This Model Act is an interim step for the gradual phasing out of most correctional institutions. Probation and parole programs and criteria for the granting of probation and parole must be strengthened. If they are not, we shall not see community correction come into its own in this century. Both in this edition and in the first edition, the Model Sentencing Act calls for no minimum term of parole eligibility. Though this provision would increase the use of parole, few states have adopted it.

In the last few years some courts have recognized that imprisonment of indigents for nonpayment of fines is unconstitutional, thereby paving the way for abolition of imprisonment as an alternative to fines. The fine may be a more effective deterrent than im-

prisonment. Restitution to the victim through installment payments may be more effective than either a fine or incarceration; far better than fine or imprisonment can at best, it takes account of the capacities of the offender and his responsibilities to those he has harmed. Both editions of the MSA encourage the expanded use of fines; and the present edition offers the additional and important alternative of restitution as a sentence.

Application of the Model Sentencing Act's concepts would be a great advance for every state and the federal government. In many states the penal codes, including some that were revised recently, still provide for primitive sentencing, impede sound parole policy, and support repressive treatment within institution walls. If those states had adopted something

like the Model Sentencing Act, had provided enlightened training for judges and parole authorities, and had treated prisoners in the spirit of the Act, the recent riots and strikes that were reactions to repressive treatment would not have occurred.

Judges, either individually or by rule applicable throughout a jurisdiction, can institute many of the MSA guidelines, as illustrated in, for example, the Council of Judges' "Guides to Sentencing the Dangerous Offender."

We hope that the second edition of the Model Sentencing Act will encourage judges, parole boards, legislators, and probation officials to visualize as a practical goal the expanded use of community correction and the reduced use of institutions.

MILTON G. RECTOR
Executive Director

Preface to the Second Edition

IN UNDERTAKING to prepare a Model Sentencing Act, the Advisory Council of Judges determined to move the penal law onto a new and higher level. Instead of "rectification" of the existing pattern of codes, our goal was a statute conforming to the best concepts of modern penology.

The Act is a welding of two intimately related developments. The first of these is probation, based on a proper presentence investigation — the best assistance to the judge in the performance of his sentencing function. The feasibility of community treatment for the great majority of offenders has been demonstrated. The second element is the recognition that prolonged incarceration is necessary for certain individuals whose behavior patterns and personality make them highly dangerous to society.

We believe we have drafted a statute that serves these purposes better than any existing code does.

The definition of "dangerous offenders," together with the procedure for referral for clinical diagnosis, makes it possible for the first time to achieve reasonable accuracy in identifying such persons. Rehabilitation and treatment are indeed contemplated for them, but society is protected from the premature release of known dangerous offenders. At the same time the plan clears the way toward dealing with other offenders, those in the nondangerous category, by sentences insuring the best hope of rehabilitation.

The statement above, my preface to the first edition of the Model Sentencing Act, is still apt. The Model Sentencing Act in its new edition retains

these basic features. Had the Act been adopted by legislatures after it was first published in 1963, many of the recent tragedies in prisons might well have been prevented.

One purpose in the second edition is to reiterate its principles. But we also have made certain changes, to strengthen the rights of defendants on the sentence, which we feel will also strengthen the judgments of the court. The second edition is also more specific on an important implication of the dangerous offender concept: it includes a provision to eliminate the insanity defense. As explained in the Act and comments, the troublesome and competing rules for the insanity defense do not solve the problem of the mentally ill offender. What is out-of-date is not the formulation of the rules but the existence of the insanity defense.

Again quoting from the original preface:

Does the Act formulate an unattainable ideal? We think not. Indeed, it strikes us as the only practical way to avoid the consequence of the codes existing in this country. They have succeeded in building up the most punitive penology in the Western world. We believe that America, like England, can lessen the use of prisons for nondangerous persons and reduce the waste of money and men that goes on under our present system.

ALFRED P. MURRAH
Chairman, Council of Judges

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Model Sentencing Act

Second Edition

Introduction

THE PRINCIPAL ORIGINAL CONCEPT of the Model Sentencing Act is a statutory definition of dangerous offenders and nondangerous offenders, operable under specified procedures for meeting the proposed criteria that establish dangerousness.

How would application of this Act improve our correctional systems and their services? Dangerous offenders constitute only a small percentage of long-term prisoners, who are usually confined in large maximum-security institutions. The Model Act provides a sentencing basis for a correctional system in which the long-term population would consist only of racketeers and uncontrollable, currently untreatable persons, who can be dealt with in rehabilitative institutions very much smaller than and different from today's maximum-security prisons.

What of other offenders? Here again the distinction between the dangerous and the nondangerous is uniquely productive. The best federal and state institutions are of the open or minimum-security type. Any nondangerous offender requiring institutionalization could be treated in such institutions, where education and counseling would be the principal treatment techniques.

The statute does not suggest that every disturbed offender must necessarily be a long-term, but rather that every long-term must be either a racketeer or a dangerously dis-

turbed offender. Each sentence, of course, should be tailored to the needs of both society and the defendant. Thus, in some instances, intensive psychiatric treatment might well be combined with a short term; and some long-termers may respond so poorly to psychiatric treatment that confinement without much treatment would be best. In any event, every defendant confined for a short or a long term should probably be given some therapeutic treatment. The setting, intensity, and duration of such treatment will vary according to the individual case.

In most states this plan of operation would cost less than existing correctional systems. It calls for a greater investment in diagnosis and in treatment personnel in the costly long-term institution for the dangerous offender. But this institution would be much smaller than the average maximum-security institution today, and any nondangerous offender requiring confinement could be kept in open or minimum-security institutions that cost less to construct and operate.

Application of the Model Sentencing Act would also greatly increase the percentage of defendants placed on probation, given a suspended sentence, or fined without imprisonment. The expensive item in the correctional budget is the cost of commitment care, not probation or other services.

Disparity in Sentencing

A universal criticism of sentencing is the disparity of sentences imposed, the variations being accounted for by factors other than the character of the defendant and the needs of rehabilitative treatment. The individual philosophies of the judges and their different attitudes toward particular kinds of offenses result in unequal sentences. In addition, the sentencing judge cannot help being influenced by the penal codes, which call for different penalties according to the offense.¹ Although the offense is generally recognized as not a useful guide to the sentence, it is the dominant criterion in the statutes in every jurisdiction.² Sentencing according to the offense alone goes back a long way and was at one time a valid reform. Philosophically it can be traced to Beccaria's historic essay, *On Crimes and Punishments*, published in 1764 and immensely influential everywhere, and to ancient Rome. And so Blackstone wrote of the need for penalties graded according to the offense, but his motive, like Beccaria's, was to limit the fearful application of the death penalty, then the punishment for numerous offenses, some of them very petty.

In its application the indeterminate sentence, heretofore the only legislative attempt to combat disparity, has increased rather than decreased it. The provision for a minimum term creates disparity of sentences by setting a variety of mandatory terms of incarceration. One defendant may receive a term of one

to five years, another two to four, three to five, three to six, and so on, all of which disparity would not exist if there were no minimum term. In addition, the minimum term impedes the parole process, since a parole board has no discretion to consider parole of a prisoner until the minimum term has been served.

The Model Sentencing Act diminishes the major source of disparity—sentencing according to the particular offense. Under it the dangerous offender may be committed to a lengthy term; the nondangerous defendant may not.³ It makes available, for the first time, a plan that allows the sentence to be determined by the defendant's make-up, his potential threat in the future, and other similar factors, with a minimum of variation according to the offense.

Influence of the MSA

The 1963 edition of the Model Sentencing Act has had numerous educational applications, has influenced other standards of sentencing, and has had some modest success in the legislatures.

It was clear at the outset that much educational work had to be done. Judges and others had to be informed and the concepts discussed. A program of sentencing institutes for federal judges offered one setting, and similar conferences for state judges were conducted. The proceedings of one of the conferences is illustrative of how they were used, not merely to expound the provisions of the Act but to explore their ramifications. The joint sentencing institute of the Eighth and Tenth Judicial Circuits

1. See, for example, Kessler, *Anomalous Penalties in the Criminal Law of Pennsylvania*, 3 VILL. L. REV. 142 (1958).

2. Except Oregon; see p. 3 *infra*.

3. See art. III, §§ 5, 8, 9.

held in Denver in 1966 included the following papers, with a foreword by Judge Alfred P. Murrah:

I. The Dangerous Offender

"Identification of the Dangerous Offender," by Howard P. Rome, M.D.; "Objectivity in Predicting Criminal Behavior," by Richard A. McGee

II. The Nondangerous Offender

"Treatment of the Nondangerous Offender," by Merrill A. Smith

III. The Model Sentencing Act and Federal Sentencing

"Sentences Must Be Rationally Explained," by Sol Rubin; "How Can We Effectively Minimize Unjustified Disparity in Federal Criminal Sentences?" by Judge Edward J. Devitt; "Constitutional Aspects of the Model Sentencing Act," by Sol Rubin.⁴

Another educational task was to develop new materials expanding on some of the provisions, especially those dealing with the dangerous offender. This led to the publication of two pamphlets on the main categories of dangerous offenders: "Guides to the Judge in Sentencing in Racketeering Cases" and "Guides to Sentencing the Dangerous Offender," published by NCCD in 1968 and 1969, respectively. The diagnostic procedure was explored by Judge Murrah in "The Dangerous Offender under the Model Sentencing Act."⁵

Operation of the Act requires a diagnostic service—which, though now obtainable in almost every state,⁶ has generally been used exclusively for the study of prisoners after commitment. But the use of a diagnostic service for sentencing purposes does not depend on passage of the MSA. Legislation specifically authorizing such use has been passed in Delaware

(1964), North Carolina (1967), New Mexico (1971), and Oregon (1971).

The Model Sentencing Act has been passed almost as a whole in one state—Oregon (1971, ch. 743). The statute's maximum terms are basically those recommended by the MSA; as recommended by the MSA, there are no minimum terms of parole eligibility; and the criteria of dangerousness and the diagnostic procedure are the same as the MSA's. The Oregon act contains some innovations of its own, particularly the requirement that persons committed as dangerous offenders must be given a psychiatric examination and a parole board review at least once every two years.

Many of the basic provisions of the MSA have been recommended by the state commission preparing a new penal code for Michigan. The MSA provision on sentencing of racketeers led to an analogous provision in the federal Organized Crime Control Act (1970); unfortunately, that act also contained the usual habitual offender definitions condemned by the MSA on the basis of studies demonstrating their failure. And much of the thinking of the MSA on alternatives and procedures was incorporated in the American Bar Association's Standards on Sentencing.

Sentencing of Misdemeanants

The Model Act is applicable to felonies and its adoption would not (except incidentally) affect misdemeanor sentencing. The misdemeanor presents to the community a problem no less difficult or important than the felon does. Revision of the laws governing sentencing of misdemeanants is needed. A model act for misdemeanor sentencing would have to take into account the organization of local correctional institutions,

4. 42 F.R.D. 175-233 (1967).

5. 32 Fed. Prob., June 1968, at 3.

6. See COUNCIL OF JUDGES, NCCD, GUIDES TO SENTENCING THE DANGEROUS OFFENDER 6 (1969).

parole from local institutions,⁷ provision for such special groups as alcoholics and sex offenders, informal efforts by probation departments, etc.

What of the Future?

Although this edition contains some important revisions—principally, greater precision in procedure and substantive definitions, and a new section on criminal responsibility—the basic elements are the same as before: the concept of the dangerous offender and the diagnostic procedure by which a sentencing judge can, with more assurance than under commonly existing practices, decide whether the defendant before him for sentence is a dangerous person.

Though the 1963-72 period had

7. See Standard Probation and Parole Act § 20 (1955) for such a provision.

some hopeful developments—notably the halt in executions for four years, followed by the U.S. Supreme Court's decision on June 29, 1972, holding the death penalty unconstitutional—it was generally a disappointing and even tragic decade in penology, particularly in our repressive and riot-torn prison systems.

Only a small percentage of the inmates in the typical state prison could be classified as dangerous under the criteria of the MSA. Many of the remainder—all nondangerous—have been sentenced to long terms and are, in fact, confined for long periods because the parole systems are typically hampered by mandatory minimum terms of parole eligibility.

Maximum-security institutions, as currently populated and operated, are archaic and destructive; they offer to the public no protection that could not be better provided by the Model Sentencing Act.

Model Sentencing Act

ARTICLE I. PURPOSE OF ACT

§ 1. PURPOSE AND POLICY

- 1 The purpose of penal codes and sentencing is public protection.
2 Sentences should not be based upon revenge and retribution. The
3 policy of this Act is that dangerous offenders shall be identified,
4 segregated, and correctively treated in custody for long terms as
5 needed and that other offenders may be committed for a limited
6 period. Nondangerous offenders shall be dealt with by probation,
7 suspended sentence, or fine wherever it appears that such disposition
8 does not pose a danger of serious harm to public safety.
9 Persons convicted of crime shall be dealt with in accordance with
10 their potential for rehabilitation, considering their individual charac-
11 teristics, circumstances, and needs.

COMMENT ON SECTION 1

Although in general the nature of penal treatment is determined primarily by the quality of the custodial, supervisory, and administrative personnel, the philosophy and legal structure of sentencing are highly influential.

The legal structure controls the use of community treatment, suspended sentence, probation, and fines; specifies the length and place of confinement; and limits or facilitates a parole board's operation.

A model sentencing system must point the way to adequate protection of the public, as far as that can be obtained by the sentence. Sentencing on the basis of the offense does not satisfactorily provide public protection, because it does not sufficiently take into account the offender's personality. Other sections concern themselves with this issue.

A sentence that allows a defendant to remain in the community is preferred if it does not substantially compromise public safety—preferred because it entails lower cost to the taxpayer and less disruption to the life of the defendant and his family. The philosophy stated in this section supports noninstitutional sentences wherever commitment is not clearly needed for public protection. Hence the statement at the outset that the purpose of penal codes and sentences is public protection. Public protection and the preference for treatment without commitment are again emphasized in lines 6-8 of the first paragraph. Although some persons, including a few members of the Council of Judges, maintain that punishment per se has a proper role in a sentence, the consensus is that the term "punishment" standing alone is vague.

Even probation is punishment, and conceivably a prison term can be treatment. Surely sentences should not be based on revenge and retribution.

Prosecution for a crime expresses the state's obligation to protect the citizen who has been harmed and to deter the defendant and others from committing similar crimes.

In cases where the harm was slight or where the mere apprehension and prosecution are deemed sufficient for

the purposes of deterrence, a suspended sentence may be the best alternative. Where greater control is required, probation or commitment is indicated, but not because the judge thinks it will do the defendant some good. Vengeance or punishment is not a proper motive for a sentence; so neither is treatment. The dominant purpose of the sentence—not only commitment but also suspended sentence, probation, and fine—is public protection.

ARTICLE II. PRESENTENCE INVESTIGATION

§ 2. WHEN INVESTIGATION MADE

- 1 After a defendant is convicted of a crime the sentence for which
- 2 may include commitment for more than six months, or when the
- 3 judge is considering probation without conviction as provided in
- 4 Section 9, a written report of investigation by the probation officer
- 5 shall be presented to and considered by the judge before he imposes
- 6 the sentence or probation without conviction.
- 7 The judge may, in his discretion, order a presentence investiga-
- 8 tion for a defendant convicted of any lesser crime or offense. The
- 9 court shall make rules as to the exercise of such discretion.
- 10 If the defendant was at large on bail or recognizance be-
- 11 fore conviction, he shall be continued on bail or recognizance until the
- 12 sentencing hearing unless the judge finds that, upon conviction, the
- 13 defendant if released is not likely to appear at the hearing or is likely
- 14 to commit another crime.

COMMENT ON SECTION 2

No sentence for a serious crime, whether classified as felony or misdemeanor, can be satisfactorily designed without a great deal of knowledge of the defendant. The demonstrated way to obtain this knowledge is to conduct a presentence investigation, with the information to be presented subse-

quently at the sentencing hearing. The section calls for such an investigation when the sentence may include commitment for six months or more or when the judge is considering probation without conviction under Section 9.

A presentence investigation is re-

quired by statute in every felony conviction in the federal jurisdiction and in California, Colorado, Connecticut, Indiana, Michigan, Montana, and Rhode Island; in New Jersey, it is required by court rule.

**§ 3. CONTENT OF INVESTIGATION; COOPERATION
OF AGENCIES**

- 1 Whenever an investigation is required, the probation officer
2 shall promptly inquire into the characteristics, circumstances, needs,
3 and potentialities of the defendant; his criminal record and social
4 history; the circumstances of the offense; the time the defendant has
5 been in detention; and the harm to the victim, his immediate family,
6 and the community. A physical and mental examination of the de-
7 fendant shall be included in the investigation when ordered by the
8 judge where it is indicated by the defendant's behavior or by other
9 good cause shown, as provided by rules of court.
- 10 All local and state institutions, courts, and police and other
11 agencies shall furnish to the probation officer on request the defend-
12 ant's criminal or other record and all other revelant information.
- 13 When the court imposes its sentence, it shall correct any errors
14 in the presentence investigation.

COMMENT ON SECTION 3

The principal difference between this section and the corresponding section in the first edition is in the last sentence of the first paragraph, which requires the judge to have a reason for ordering a physical and mental examination of the defendant. In the absence of this requirement, the investigation, particularly a psychiatric investigation, can be both prejudicial to the defendant and burdensome to the court's limited clinical resources.

The third paragraph is also new. It is added for the obvious reason that a presentence investigation may subsequently be used for a purpose other than the sentencing court's—for ex-

ample, it may be used by an appellate court or a commitment institution.

Section 3 requires that the presentence investigation include information on the defendant's time spent in confinement before sentencing. The court may consider whether it wishes to reduce any term of commitment by part or all of the presentence confinement time. The Model Act does not deal with the power of the court to give "credit" on the sentence. In most jurisdictions, a statute covers this or the judges exercise the power without statute. The court's power should extend to confinement time before imposition of the sentence, including confinement pending an appeal.

§ 4. AVAILABILITY OF REPORT TO DEFENDANT AND OTHERS

- 1 The presentence investigation and any supporting reports, in-
2 cluding diagnostic reports and the probation officer's recommenda-
3 tion where the judge has required or allowed a recommendation to
4 be made, shall be made available to the attorney for the state and to
5 the defendant and his attorney in advance of the hearing on the
6 sentence, provided that, pursuant to rules of the court, the identity of
7 the informant or information leading to his identity may be withheld
8 if his security or the security of a vital family relationship would be
9 endangered by the disclosure.
- 10 The investigation and supporting reports shall be part of the
11 record but shall be sealed and opened only on order of the court.

COMMENT ON SECTION 4

In a few jurisdictions a defendant has a right to see the presentence investigation report; in most jurisdictions he may see it, or parts of it, only by the judge's authorization.

The first edition of the Model Act adopted the latter position for sentencing of the ordinary offender and held that, in regard to the defendant being sentenced as a dangerous offender, the length of the commitment and the character of the findings required before sentence may be imposed are such that due process requirements suggest additional safeguards for him. Accordingly, the Act required that the presentence investigation and clinical reports be made available to him. Compare *State v. Wingler*, 25 N.J. 161, 135 A.2d 468 (1957), involving a sentence under the New Jersey Sex Offender Act. Observing that the statute did not require the diagnostic center's report to be submitted to the defendant, the court declared:

Nevertheless we are convinced that the interest of justice will be advanced if, in every case which arises hereafter, the trial court, before imposing sentence under the Sex Offender Act, submits the Diagnostic

Center's report to the defendant and affords opportunity to be heard thereon. An appropriate administrative directive will be issued forthwith by this court.

The principal change in this section is a strengthening of the right of *all* defendants (not only those being sentenced as dangerous offenders, as in the first edition) to see the report. Any sentence, and certainly a sentence of commitment, should be surrounded by adequate due process protection.

Those who argue that the report should not be made available to the defendant as a matter of right emphasize the threat that doing so would dry up informational resources or endanger an informant who has given adverse information. Most members of the Council of Judges maintain that the threat of drying up information is exaggerated. An informant can always be subpoenaed, but this would be required in only the rarest of instances. As to protection of an informant, the section now provides for withholding his identity where his safety would be endangered.

ARTICLE III. SENTENCES FOR FELONIES

§ 5. DANGEROUS OFFENDERS

1 Except for the crime of murder in the first degree, the court
2 may sentence a defendant to a term of commitment of years stated
3 but not more than thirty years if either of the following grounds is
4 found to exist :

5 1. The defendant is being sentenced for a felony in which he
6 (a) inflicted or attempted to inflict serious bodily harm or (b) seriously
7 endangered the life or safety of another and he was previously
8 convicted of one or more felonies not related to the instant crime as a
9 single criminal episode, and (c) the court finds that he is suffering
10 from a severe mental or emotional disorder indicating a propensity
11 toward continuing dangerous criminal activity.

12 Whenever the court, upon entering the conviction or receiving
13 the investigation report, has reason to believe the defendant falls
14 within the category of subdivision 1(a) or 1(b), it shall refer him
15 to [diagnostic facility] for study and report as to whether he is
16 suffering from a severe mental or emotional disorder indicating a
17 propensity toward continuing dangerous criminal activity. Such
18 referral shall not exceed ninety days, subject to additional extensions
19 not exceeding ninety days on order of the court. The defendant shall
20 not be sentenced under subdivision 1(a) or 1(b) unless the judge,
21 after considering the presentence investigation, the report of the
22 diagnostic center, and the evidence in the case and at the sentencing
23 hearing, finds that the defendant comes within the purview of
24 subdivision 1(a) or 1(b) and 1(c) and is therefore in need of
25 correctional treatment or custody for a prolonged period. The
26 findings shall be incorporated in the record.

27 2. The defendant is being sentenced for a felony committed as
28 part of a continuing criminal activity in concert with five or more
29 persons, the defendant having been in a management or supervision
30 position or having given legal, accounting, or other managerial
31 counsel or, as a public servant, having unlawfully done or omitted to
32 do anything in order to promote the criminal activity.

33 No sentence shall be imposed under this section unless the
34 prosecuting attorney has notified the defendant in writing, in advance
35 of the trial or a plea of guilty, that the prosecution intends to ask for
36 an extended sentence under this section in the event of the defen-
37 dant's conviction.

38 Any commitment shall be to the custody of [director of correc-
39 tion].

The basic concept of the MSA's first edition—a statutory distinction between the dangerous and the non-dangerous offender, with operable criteria controlling the distinction—is continued, as is the definition of the two groups categorized as dangerous: the assaultive criminal and the racketeer. This section establishes the criteria for identifying them.

Lengthy terms of imprisonment today are imposed according to either the offense committed, not a reliable guide, or, more usually, the number of previous convictions. Numerous studies have shown the latter also to be an unreliable guide, leading to unfairness and a great disparity of sentencing.⁸

Instead of these demonstrably untrustworthy signs, the Model Act establishes a legally and socially precise delineation of dangerous persons and a legally and clinically careful procedure for identifying them. It proposes that an offender be sentenced as dangerous if he fits into any one of three categories: (1) he inflicted or attempted to inflict serious bodily harm, and he has a propensity to commit crime; (2) he committed a crime (such as arson) which, intended or not, seriously endangered the life or safety of another, he has a previous criminal conviction, and he has a propensity to commit crime; (3) he is a participant in organized crime, racketeering.

The Assaultive Offender

The requirement of diagnosis of severe mental or emotional disorder indicating a propensity toward continuing dangerous criminal activity is admittedly difficult to accept, and we do not dismiss its uncertainties in theory and practice. The behavioral sciences do not now have sufficient expertise to carry out this assignment adequately. How, then, can the procedure not only be proposed but also (as in Oregon, where the act has been passed) be made operable?

First, contrary to the impression that some people receive or give, the effect of the diagnosis provision will be in general to shorten terms, not to lengthen them. In almost all jurisdictions today, in the absence of usable criteria and wholly at the discretion of the sentencing judge, sentences of thirty years and more are not rare.

In contrast a term of such length may, under the Model Act, not be imposed without meeting certain criteria.

A diagnostic clinic has no difficulty determining whether a man is suffering from a severe mental or emotional disorder. Relating that kind of diagnosis to a likelihood that he will commit further crimes does present a problem. But even here the Model Act says that the defendant's likelihood of committing further crimes must be supported by his record. A judge may find, for example, that a man who committed the type of crime cited in the section did so under unusual circumstances or that he was, shall we say, over twenty-five at the time and had never previously committed such a crime. He is justified in finding that this defendant is not likely to commit that crime again.

8. See Brown, *The Treatment of the Recidivist in the United States*, 23 CAN. B. REV. 640 (1945); Tappan, *Habitual Offender Laws and Sentencing Practices in Relation to Organized Crime*, in M. PLOSCOWE, ed., *ORGANIZED CRIME AND LAW ENFORCEMENT* (1952).

In the light of today's limited knowledge of prediction of criminal behavior (or any behavior), we make it clear that the judge, representing society, makes a common-sense decision based on as much relevant information as possible. Sentencing of *any* offender is a judicial task, not a decision for doctors or behavioral scientists.

But the expertise of psychologists and psychiatrists can be helpful to the judge.

Our "Guides to Sentencing the Dangerous Offender" was produced in response to the question that these comments seek to answer. We quote only one paragraph of it and suggest that the reader examine the entire publication.

The diagnostic report should help the court determine the persistency of assaultive patterns. If the defendant's violence arises out of an irrational response to situations that will occur frequently in his lifetime or when he is under the influence of alcohol or drugs, or even if he is likely to strike out physically at others when he has had an argument, he is probably one who comes within the concept of dangerousness. But it must be borne in mind that not every short-tempered person who gets into fights readily is a serious threat; relatively few are "dangerous" in the sense considered in the Model Sentencing Act. If a seriously disturbed person commits a crime which the diagnostic study indicates he is not likely to repeat, either because the circumstances were unusual and not likely to reoccur or because the mental illness had nothing to do with the criminal act, a long term is probably not needed to protect the public. The focus should be not on heinousness but on the danger of repetition.⁹

9. *Supra* n.6, at 11-12.

Only a small percentage of offenders in penal institutions today meet the criteria of dangerousness. In any state no more than one hundred persons would have to be confined in a single maximum-security institution, which, because of its small size, could be staffed for genuine treatment; other offenders would be either on probation or in institutions of less than maximum security. The reduction in costs would be considerable, protection of the public would not suffer, and the treatment of offenders, both dangerous and nondangerous, would probably be more effective.

We also make clear that a mentally disordered offender who commits an offense other than those cited in the section (for example, a writer of bad checks) may not be committed as a dangerous offender.

In subdivision 1(c) the language used is "severe mental or emotional disorder," contrasting with "severe personality disorder" in the first edition. The change was adopted because a number of psychiatrists had pointed out that the term "personality disorder" might be mistakenly construed as the classification of a specific type of disorder. Our intent, now clarified, was to refer to defendants who, in the terms of laymen, were suffering from some mental or emotional disorder and not to limit the disorder to any one specific diagnosis.

Organized Crime Offenders

Subdivision 2 of section 5 is intended to enable courts to sentence to long terms offenders who are involved in rackets, organized or syndicated crime. It relates these offenders to their true danger to society.

Today, in the relatively rare instances in which they are appre-

hended and convicted, they are sentenced for such crimes as income tax evasion, loitering, and vagrancy or, as in the case of the apparently important individuals apprehended at Appalachin, N.Y., in 1957, for conspiring to obstruct justice by refusing to testify. The effect of a sentencing provision standing alone is extremely limited: racketeering crimes must be redefined and law-enforcement efforts must be strengthened. However, the subdivision does provide courts with increased power to sentence to long terms racketeer defendants who come within its broad provisions.

In the first edition, the corresponding provision defining the organized crime defendant referred to him as one who was being sentenced "for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as part of a continuing criminal activity in concert with one or more persons." The new language of subdivision 2 does not refer to these offenses by name because, although once typical, they no longer accurately reflect the wider scope of organized crime enterprises. Conversely, there was in the first edition too great a possibility of applying the long term—up to thirty years—to a defendant who had committed his crime "in concert with one or more persons," since many such defendants had no relationship whatsoever to organized crime. The wording of subdivision 2 of the section now in the Act is much more realistic and is comparable to the language in the organized crime bill passed by Congress in 1970.

Terms of Commitment of Dangerous Offenders

Section 5 authorizes commitment of dangerous offenders for a period long enough—up to thirty years—to protect the public against them and to afford ample opportunity for therapeutic efforts to be made. The statutory maximum is not mandatory; the judge may fix the maximum at any period less than thirty years. This discretion is provided for in the case of long-term commitments to give scope to individualized consideration of the defendant.

A life term is not authorized except for murder in the first degree (see section 7). The surge of aggression, of violent action, is a characteristic of the young rather than the old offender. The term of years authorized would be ample, in almost all cases, to confine him until that period of his life when release would be safe and rehabilitation likely. This holds true even for some so-called sociopaths.¹⁰ If an offender could not be released at the end of a thirty-year term, his disorder would almost inevitably be the kind that would render him committable to a state mental hospital.

Why should a life term be avoided? Though the offender sentenced to it is subject to release, a life term is a psychological set against any treatment other than the passage of time. Even the small minority of offenders who are diagnosed as dangerous should be dealt with according to treatment principles.

10. See, for example, G. PLAYFAIR & D. SINGTON, *THE OFFENDERS—THE CASE AGAINST LEGAL VENGEANCE* (1957), particularly the chapter on Aake Horsten.

Life terms present difficulties in parole operations in many states. Many parole boards have a rigid attitude toward life terms and defer parole for so long a period, far beyond the necessities of public protection, that the personality of the inmate is destroyed. Legislatures often attach parole eligibility limitations—minimum terms of fifteen or twenty years—that prohibit release even when the prisoner has been rehabilitated and can safely be paroled. Furthermore, in some states a life-term sentence excludes parole, a sentence described by a Minnesota warden as “the penalty worse than death.”¹¹

Guttmacher points out that “Whenever a former inmate of a psychiatric hospital commits a homicide, there is likely to be raised a hue and cry, demanding that such things stop.” When one such case occurred in New York a few years ago, he writes, the governor called a conference to consider the whole question:

Little came of it, because it was the view of those of us who were in attendance that until we had an absolute and permanent cure for all psychotic patients, such an occasional tragedy must necessarily be perpetrated by discharged patients. The only sure way to prevent them would be to keep all psychiatric hospital patients in permanent custody, an act the impracticality of which would be surpassed only by its inhumanity. There must be this irreducible minimum of such cases. If none ever occurred, we could conclude that discharge policies were too strict. In the same vein, psychiatric hospitals in which no suicides ever occur and juvenile correctional schools in which there are no escapes must be considered to be poor institutions because they are too strictly organized to accomplish their therapeutic purposes.¹²

11. Rigg, *The Penalty Worse Than Death*, Saturday Evening Post, Aug. 31, 1957.

12. M. GUTTMACHER, *THE MIND OF THE MURDERER* 45-46 (1960).

In similar vein a recent California report concludes that “any release procedure involves risks”:

The only way to assure that no danger will result is not to release anyone. This would be intolerable not only as a matter of public policy and constitutional law, but as a matter of public economy. Furthermore, not only must calculated risks be taken, but simple mistakes will be made in particular cases. These risks and these mistakes are an inevitable part of custodial administration.¹³

After serving substantial parts of their terms, most long term prisoners are relatively harmless. Far from being a menace, many of them are pitiful individuals rotting out their lives in unproductive, expensive, and usually maximum-security custody. M. R. King, superintendent of the California Medical Facility at Terminal Island, speaking on the subject at the 1953 Congress of Correction, pointed out that of the nearly 13,000 inmates then in California correctional institutions, 1,438 were forty-five to fifty-four years old and 726 fifty-five or over. Older inmates, he stated, often find themselves out of place and “unwanted” in institutions whose programs are geared for younger prisoners. The great majority are no longer security risks, some indeed being so slow and infirm that they “have difficulty in keeping up with the lines.” At times they must be fed in their cells or admitted to the hospital for special care. (Proportionally, the statistics have not changed. In 1968, the population of 22,410 in California prisons included 2,196 inmates between the ages of forty-five and fifty-four and 1,053 who were fifty-five or older.)

In 1959 New York’s prisons held

13. State of California, Special Commissions on Insanity and Criminal Offenders, *First Report*, July 7, 1962, at 39.

1,000 prisoners sixty-five years of age or over, housed mainly in maximum-security facilities. "This housing," said the New York Prison Association in its 1959 report to the legislature, "is costly and in some instances the physical layouts impose a hardship on the older prisoners because of conditions of health or various infirmities."

Most of the habitual offender laws provide for a life sentence on a third or fourth felony conviction. As already observed, the application of these laws is extremely spotty, and the way in which certain persons receive a life term under these laws and other persons do not is completely removed from individual case requirements.

Referring to some pathetically unnecessary long-term cases, Warden Ross V. Randolph declared:

Disheartened, embittered prisoners are always a source of trouble to good prisoners, and to the administration of a penal institution. . . . An embittered person leaving a correctional institution is a bad risk and a costly product for the state as well as society in general.¹⁴

A report of the Federal Bureau of Prisons has this to say about long sentences:

If the purpose . . . is to deter other potential offenders, it cannot be demonstrated that they have any substantial effect on the reduction of crime rates. If, on the other hand, the purpose of a long sentence is to increase the severity of the penalty for the sake of punishment alone, history and experience tell us how self-defeating this can be. Recognizing that certain dangerous criminals must be kept out of circulation for the protection of society, the long and mandatory sentence nevertheless rejects the basic correctional concept that an offender should be given the opportunity to retake his place in society when there are reasonable grounds

to expect that he can do so without again violating the law.¹⁵

James V. Bennett, director of the Federal Bureau of Prisons, gave the following analysis of the nature of the offenders annually committed to state and federal prisons:

The largest number of these men by far are those who have been convicted of acquisitive crimes — burglary, larceny, forgery, automobile theft, and the like. In this category fall about 65 per cent of the major offenders who are committed to state prisons during a typical year. The next largest number are robberies, 11.7 per cent, and then come the aggravated assault cases and the drug violators, with 10.7 per cent. Homicides, rapes, and kidnappings together account for about 9 per cent. The remainder are for miscellaneous crimes like arson, gun-law violations, and I suppose adultery. These figures are in rather startling contrast with generally held views. The general public has the notion that most criminals and convicts are rapists, robbers, or murderers. This is not the case.¹⁶

Consideration was given to the suggestion that a defendant sentenced to a term of more than five years should be given a right to have his continuing confinement re-examined by a court upon an institutional report at regular intervals. Such a proposal was not incorporated in the Act. Periodic review by the institution and parole authorities should occur—and it does—without requirement by statute. A statutory requirement might have a limiting effect on administrative review. A statute that would make review mandatory every year would be disapproved by administration as too rigid; on the other hand, expressly

14. Randolph, *Are Long Sentences Necessary?*, Am. J. Correc., March-April 1959.

15. U.S. Department of Justice, Bureau of Prisons, *Federal Prisons*, 1957, at 3, 5 (1958).

16. Bennett, *A Briefing for Lawyers on Prisons*, Sterling Lecture Series, Yale University Law School, Feb. 15, 1960.

authorizing review at some significantly greater interval, such as five years, might induce laxity and would encourage an acceptance of long-term incarceration. Perhaps the requirement of review every two years in the

new Oregon law based on the MSA will be successful.

Lines 33-37 are new, added to strengthen the due process of the procedure under which a long term could be imposed.

§ 6. CRIMINAL RESPONSIBILITY

1 Except where recklessness or negligence is the basis for a crime,
2 a defendant shall be held responsible for his act if he knew what he
3 was doing and shall, upon conviction or plea of guilty, be sentenced
4 in accordance with the provisions of this Act. A defendant whose
5 defense is that he is not responsible because he did not know what he
6 was doing shall so specially plead at the time he pleads to the act
7 charged. A later plea of nonresponsibility may be accepted by the
8 court if good cause is shown for failure to so plead at the time of
9 arraignment. If a defendant pleads not guilty on the grounds of
10 nonresponsibility, the issue of responsibility shall be decided separately
11 before determination of other issues; if that plea is accepted by
12 the prosecutor and the judge, he shall be treated as not responsible.
13 A defendant who has been found to have committed the act
14 charged but is acquitted solely because he was not responsible for the
15 act shall be committed to an appropriate institution for treatment
16 until he is no longer a threat to public safety if the judge finds after a
17 hearing that the test of dangerousness set forth in subdivision 1 of
18 section 5 is applicable to the defendant and that the defendant is
19 suffering from a disorder specified in that subdivision.

COMMENT ON SECTION 6

When the first edition of the MSA was published, it was evident to us that, utilizing as they did the mental capacity of the dangerous offender, the criteria for sentencing him had immediate implications for a rule of criminal responsibility. In colloquial conversation we referred to the formulation of these criteria as "the Durham Rule for sentencing, M'Naghten for criminal responsibility"—i.e., if due account of the defendant's mental capacity or aberration is taken on the sentence, a narrow rule of

criminal responsibility is acceptable and no defense of insanity is justified, provided the test of mens rea is met. A statement to this effect was, in fact, prepared for inclusion in the comment, but for various reasons it was omitted in the final manuscript. Subsequently, it was formulated in an article by Chief Judge Alfred P. Murrah, then (and now) chairman of the CJ:

Although we started work on the Model Sentencing Act without any thought of affecting a rule of criminal responsibility,

it became evident after a while that the approach we were taking had important implications for such a rule. It came through the emphasis we placed on diagnosis for sentencing purposes. . . .

The lesson was that psychiatric expertise should be used not to exculpate a defendant, not a very useful thing, since there is less flexibility in the alternative disposition than in correctional treatment; but rather to decide—did he do it, and if so, how shall he be managed. . . .

Once the minimum requirement — in effect, nothing more than *mens rea* — is established, we should go no further on the trial issue of insanity, and leave the question of mental illness and what to do about the defendant to the sentence.¹⁷

When the revision of the MSA was undertaken, this approach was again discussed, was accepted, and was put into the statutory language of the first sentence of section 6. The remainder of the first paragraph deals with procedure for the rare case in which the defense of “guilty but not responsible” may be pleaded.

The second paragraph of the section permits commitment of such an offender. Unlike some of the existing legislation on acquittal for insanity, it does not allow the commitment to be routine or totally discretionary; as in some statutes, there must be a hearing and a finding of dangerousness.

§ 7. MURDER¹⁸

1 **A defendant convicted of murder in the first degree shall be**
2 **committed for a term of life.**

COMMENT ON SECTION 7

In principle, murder in the first degree should not be differentiated from other offenses, for which a life term may not be imposed.

However, there is no doubt that murder in the first degree is generally deemed a uniquely heinous crime for which the gravest penalty under the code should be imposed. The Act does not provide for the death penalty; its entire frame of reference is a diagnostic and treatment approach to all offenders.

Although murderers make up the great majority of life-term prisoners, the evidence is quite clear that they are good risks in minimum-custody institutions and on parole.¹⁹ In some states a term of years is authorized for murder, and life-term prisoners are sometimes released shortly after sentence.

17. Murrah, *The Dangerous Offender under the Model Sentencing Act*, 32 Fed. Prob., June 1968, at 7, 8.

18. In the federal and some state jurisdictions, presumably the crime of treason would also be included.

19. See Harriman, *Mercy Is a Lonely Business*, Saturday Evening Post, March 22, 1958; Samuels, *Parole—The Issue*, N.Y. Times (Magazine), Sept. 18, 1960; NCCD, *The Michigan Sentencing and Penal Laws* (1961) p. 29; California Assembly, Subcommittee on the Judiciary Committee on Capital Punishment, *Problems of the Death Penalty and its Administration in California*, Assembly Interim Committee Reports, 1955-1957, vol. 1 no. 3, p. 12.

OPTIONAL § 8. ATROCIOUS CRIMES

1 If a defendant is convicted of one of the following felonies²⁰ —
2 murder, second degree; arson; forcible rape; kidnapping; robbery
3 while armed with a deadly weapon; mayhem; bombing of an air-
4 plane, vehicle, vessel, building, or other structure—and is not com-
5 mitted under section 5, the court may commit him for a term of not
6 more than ten years or may sentence him under section 9.

COMMENT ON OPTIONAL SECTION 8

Inclusion of this optional section in the Act is supported by a number of members of the Council of Judges in the belief that persons who commit the crimes listed, even if they are not suffering from an emotional disorder, may require more control than the average offender, whose commitment is limited to a five-year term. Other members of the CJ consider that the other provisions of the Act amply deal with all requirements of public protection, deterrence, and treatment and that one of the important principles of the Act—sentencing mainly on the basis of the offender rather than the offense—is contradicted by the provision regarding named offenses.

§ 9. SENTENCING FOR FELONIES GENERALLY;
PROBATION WITHOUT CONVICTION

1 Upon receiving a verdict or plea of guilty the court may,
2 without entering a judgment of guilt or accepting the plea and with
3 the consent of the defendant, defer further proceedings and place the
4 defendant on probation upon such terms and conditions as it may
5 require. Upon fulfillment of the terms of probation the defendant
6 shall be discharged without court adjudication of guilt, and an order
7 shall be entered expunging the verdict or plea of guilty. Upon
8 violation of the terms, the court may enter an adjudication of guilt
9 and proceed as otherwise provided in this Act.
10 If a defendant is not committed under section 5 or 7 [or 8], the
11 court shall (a) suspend the imposition or execution of sentence, with
12 or without probation; or (b) impose a fine as provided by law for
13 the offense, with or without probation or commitment; or (c) commit
14 the defendant to the custody of [director of correction] for a term of
15 not more than five years or to a local correctional facility for not
16 more than one year. Where a sentence of fine is not otherwise
17 authorized by law, in lieu of or in addition to any of the dispositions
18 authorized in this paragraph, the court may impose a fine of not more
19 than \$5,000. In imposing a fine the court may authorize its payment
20 in installments. In sentencing a defendant to probation the court shall

21 direct that he be placed under the supervision of [the probation
22 agency].

23 A defendant sentenced under this section or section 5 or 7 [or
24 8] may also be ordered to make restitution to the victim of the crime
25 or the dependents of the victim who has died as a direct result of the
26 crime, for any money or property loss or compensation for injury
27 directly resulting from the crime, either as a condition of probation
28 or as an order joined with the sentence. If restitution is not paid as
29 ordered, a civil judgment may be entered for the unpaid amount.

COMMENT ON SECTION 9

Probation without Conviction

The first paragraph of the section provides for probation without conviction, sometimes called deferred conviction, deferred sentence, or probation on consent. Such a procedure to avoid conviction is successfully used in Maryland, Rhode Island, Washington, and a few other jurisdictions; in most jurisdictions it would be an innovation. The usual objection to it is that witnesses disappear after the sentence and that in general the postponement handicaps the prosecution. The Model Act avoids that difficulty; what is deferred is the judgment, not the prosecution; guilt is established by verdict or plea. Judgment of guilt is not entered, pending the outcome of the probation-without-judgment. If the defendant fails on probation, all that has to happen is the entry of the judgment of guilt and the consequent sentence.

The first edition of the MSA included an article on sentencing of youthful offenders. It permitted a person above juvenile court age and under twenty-one to be tried without entry of conviction as a criminal. Upon reconsideration, it appeared to us that the same objective may be

achieved through the use of deferred sentence, available for any offender; therefore, we removed the article.

Another reason for its deletion was that the article encouraged states to authorize special youthful offender sentences which are sometimes more punitive than sentences imposed on adults, as in the current federal youth correction act and the former New York state procedure. In New York, whose procedure was the source of the youthful offender article in the first edition of the MSA, the legislature has revised the law so that a youthful offender may no longer be committed for a term longer than that imposed on an adult for the same offense.

Suspended Sentence, Probation, Fine

The second paragraph includes provisions for the usual forms of treatment in the community. It authorizes not only probation (supervised release at the point of sentence), but also suspended sentence without probation for those cases in which supervision is not needed. In some states the courts, under statute or decision, do not have this power.

Section 9 should be read in conjunction with section 1, which expresses preference for forms of community treatment.

20. The correct title under the criminal code of a particular state may be inserted in lieu of the stated offenses.

Probation is fairly well developed in many communities and states, but even there the trend to greater use of imprisonment continues. Why? One answer may be that increases in probation grants are made up largely of the obviously safe cases, those for whom fines and suspended sentences were previously used. If that is so, the increased incidence of probation would not reduce the number of prison commitments. In any event, . . . we can reduce the prison population only by (a) checking carefully to determine whether we judges should grant probation to many persons now being committed to prison and (b) increasing the use not only of probation, but of the other forms of community treatment—fines and suspended sentences — as well.

Extensive use of the fine in England has demonstrated its value in a remarkable reduction of institutional commitments. . . .

More frequent use of suspension of sentence without probation, like the fine, is part of the answer to the prison problem. The national average use of probation is probably about one-third of felony convictions. Many of our informed students of crime tell us it can safely be two-thirds, and that public security would not be damaged with that percentage of usage.

We achieve success even now with many probationers who receive little or no actual help or guidance from their overworked probation officers. Can we not assume that these offenders would have been equally successful if they had received suspended sentences, without probation? When we speak of trying to achieve greatly increased use of probation, we are really referring to both probation and suspended sentence.

There are cases in which the risk of failure on probation involves sufficient threat to the community to warrant commitment to penal institutions — unless there is a skilled probation service to minimize the danger. In the absence of enough skilled probation officers, these borderline cases are often committed to penal institutions. On the other hand, much of the average probation caseload is

made up of the obviously safe risks, persons who do not present difficult problems of treatment or whose behavior is not a threat, particularly not a physical threat, to persons in the community. If they were released without supervision — if they were given suspended sentences instead of probation — the staff could devote a far greater proportion of its time than it now can to the difficult cases, those for whom expert casework service is sorely needed to avoid commitment.

This does not imply that with caseloads reconstituted as suggested, we now have enough well-trained probation officers to do the job that has to be done. Most positively we do not. But only by some such redistribution of judicial dispositions can probation begin to make its proper impact on the prison problem. Such a course has not been regularly followed, except in a few instances. Perhaps that is why the prison problem becomes more acute every year.²¹

Another form of correction that avoids institutionalization is the fine. In most jurisdictions this disposition is used too sparingly, especially for felonies. Thanks to the Act's basic classification of dangerous and non-dangerous offenders, a fine can be selected as the sentence for any non-dangerous offender. In most jurisdictions this authorization would considerably increase the use of fines as a sentence. This provision does not alter a state's existing statutes providing for fines; rather, it extends the possible use of fines to additional cases.

Restitution

The third paragraph, new in this edition, permits an order of restitution to the victim of the crime or his dependents. Although restitution is commonly used today as a condition of probation, it may also be indicated

21. Laws, *Criminal Courts and Adult Probation*, 3 NPPA J. 357-58 (1957).

where probation is inappropriate—for example, where the defendant is a racketeer or is otherwise sentenced as a dangerous offender.

The ancient English common-law rule was that stolen property belonged to the sovereign, but the rule was changed in England long before American independence, by a statute providing for the issuance of a writ of restitution by the court in which the thief was convicted, . . . and has never prevailed in the United States. . . . In the United States the court may, under statutory provisions prevailing in some jurisdictions, issue orders of restitution compelling a convicted criminal, such as a thief, burglar or robber, summarily to restore to its owner stolen property or property fraudulently obtained.²²

A statute recently passed in Delaware provides that, where a judge is imposing a fine as a sentence, he may hold a hearing to determine the defendant's gain from the crime or the physical damage resulting from it and shall remit the money collected to the victim of the crime.²³

The amount of money involved may be disclosed at the trial or in a plea of guilty or may become known in some other way.

As to the means of enforcement of restitution:

Many jurisdictions have procedures for the issuance of execution upon the criminal judgment in the same way as upon the civil judgment. Or the statute may provide that the docketing of the criminal judgment imposing a fine creates a lien upon the personal and real property of the offender and is enforceable by the issuance of execution thereon.²⁴

22. C.J.S. *Criminal Law* § 2204 (1962).

23. DEL. LAWS 1969 ch. 198. Another recent statute providing for restitution in a sentence is PA. STAT. ANN. 18. § 5109 (1970).

24. S. RUBIN, H. WEIHOFEN, G. EDWARDS, & S. ROSENZWEIG, *THE LAW OF CRIMINAL CORRECTION* 254-55 (1963), citing cases and statutes.

Term of Commitment for Ordinary Offenders

The statute authorizes the judge to fix a maximum term, which may not be over five years, for offenders who, at his discretion, are to be committed but do not fall within the dangerous offender categories. The parole board may release at any time before the maximum. The length of term and the flexibility of parole release are similar to provisions in some of the youth authority acts (e.g., in California and in the federal jurisdiction).

The five-year limit on ordinary terms has been chosen to avoid (except for dangerous offenders) the excessive use of long terms, one of the characteristics of American sentences. It is closer to the pattern used for a long time in most European countries. In Sweden, said Thorsten Sellin:

In 1943 . . . there were about 179,000 sentences imposed by the courts of first instance. As Sweden abolished the death penalty in 1921, these sentences were either to fines or to some form of imprisonment. All but 9,500 were sentenced to fines; 8,500 sentences to imprisonment were for one year or less (most of them for six months or less). Only seven sentences were for six years or longer and only two for life, while 65 prisoners were given indefinite sentences as recidivists or defective delinquents, 314 were sent to a reformatory for youthful offenders, and 224 were sent to a correctional school.²⁵

After his return from the 1955 U.N. Conference on the Prevention of Crime and the Treatment of Offenders, where he served as chairman of the U.S. Delegation, Deputy Attorney General William P. Rogers wrote:

I was surprised also to note the wide difference in sentencing methods. Usually

25. Sellin, *The Treatment of Offenders in Sweden*, Fed. Prob., June 1948, at 15.

sentences are much longer in the United States than in most of the other countries represented at the United Nations conference. . . . Sentences abroad average considerably less than in this country for the same types of offenses. Few men are sent to prison for more than five years in any Western European country. Only in cases of murder or extreme violence do the courts pronounce a sentence of more than five years.²⁶

In an analysis of the data underlying his proposal of a five-year maximum for ordinary offenders, Sol Rubin wrote:

To put the ordinary limits at, say, five and ten years would be an improvement over what we have, and yet it would encourage the notion that ten years is a term which accords with a correctional program of rehabilitation. It does not. The purpose of the proposal is to make it a strongly evident policy that a sentence in excess of the proposed ordinary limit would be appropriate only for extraordinary cases.²⁷

He pointed out that in 1846 in this country the ratio of state prisoners to the general population was 1:2,436, whereas one hundred years later it was 1:1,000. In England the ratio has altered in the opposite direction, with fewer prisoners today in relation to the total population than there were one hundred years ago.

Professor B. J. George, Jr., wrote:

Our maximum sentences are probably the highest in the world, and our insistence on high minimum sentences often tends to defeat the humane impulses which produced the power of the judiciary to choose the appropriate sentence. Indeed, much may be said for abolition of all or most minimum sentences. Certainly English practice has tended toward

26. Rogers, *The Geneva Conference on Crime: Its Significance for American Penology* Fed. Prob., Dec. 1955, at 40-41.

27. S. RUBIN, CRIME AND JUVENILE DELINQUENCY—A RATIONAL APPROACH TO PENAL PROBLEMS 127 (1961).

this without adverse effect on law enforcement.²⁸

The pattern of many very long terms of commitment is a notable feature in fifteen jurisdictions, where 10.3 to 21.1 per cent of the prisoners serve more than five years on their terms before their first release. The national picture can be seen in the table on pp. 22-23, which sets forth the latest data on time served by federal and state prisoners before release—some by parole, others by expiration of term. (The data on time served are distinguished from terms of commitment; on the average in all states, one out of three terms is for ten years or more.) In eighteen states 95 per cent or over are released in less than five years; in sixteen jurisdictions, 90 to 94.9 per cent; in eight states, 85 to 89.9 per cent; in six states, 80 to 84.9 per cent. The percentage released in less than five years is under 80 per cent in only one jurisdiction (West Virginia—78.9 per cent). In short, most prisoners are now actually serving less than five years. The Model Sentencing Act, therefore, would not produce any great difference in this regard and, where adopted, its impact would be felt less on the total statistics of time served by all prisoners than on the selection of dangerous offenders and the treatment program for them as well as other offenders.

What of deterrence? Is the imposition of long terms a deterrent to others? Deterrence is primarily the product of effective law enforcement rather than of the sentencing or punishment system. However, to the extent that sentencing also carries an element of deterrence, as it does, it derives from the *potential* punish-

28. George, *An Unsolved Problem: Comparative Sentencing Techniques*, 45 A.B.A.J. 250 (1959).

TIME SERVED BY FELONY PRISONERS BEFORE FIRST RELEASE FROM FEDERAL AND STATE INSTITUTIONS, 1964*

JURISDICTION	PRISONERS RELEASED				Total % under 5 years
	Total, All Releases	Under 3 Years	3 Years, under 4	4 Years, under 5	
Federal	68,188	52,250 (76.6%)	7,024 (10.3%)	3,039 (4.4%)	91.3%
Alabama	2,331	1,793 (76.9%)	206 (8.8%)	69 (2.9%)	88.7%
Arizona	835	791 (86.1%)	57 (6.8%)	32 (3.8%)	96.7%
Arkansas	991	824 (83.1%)	83 (8.3%)	26 (2.6%)	94.1%
California	5,287	3,391 (64.1%)	1,133 (21.4%)	428 (8.0%)	93.6%
Colorado	1,215	1,116 (89.2%)	63 (5.0%)	44 (3.5%)	97.7%
Connecticut	800	586 (73.2%)	43 (5.3%)	28 (3.5%)	82.1%
Delaware	95	85 (89.4%)	2 (2.1%)	5 (5.2%)	96.8%
D.C.	612	336 (54.9%)	101 (16.5%)	63 (10.2%)	81.6%
Florida	2,929	2,153 (73.5%)	363 (12.3%)	134 (4.5%)	90.4%
Georgia	2,809	2,115 (75.2%)	300 (10.6%)	105 (3.7%)	89.7%
Hawaii	106	58 (54.7%)	28 (26.4%)	14 (13.2%)	94.3%
Idaho	262	235 (89.6%)	6 (2.2%)	6 (2.2%)	94.2%
Illinois	2,854	1,803 (63.1%)	403 (14.1%)	218 (7.6%)	84.9%
Indiana	1,205	836 (69.3%)	98 (8.0%)	73 (6.0%)	83.5%
Iowa	853	678 (79.4%)	81 (9.4%)	50 (5.8%)	93.8%
Kansas	880	681 (77.3%)	129 (14.6%)	50 (5.6%)	97.7%
Kentucky	1,582	1,154 (72.9%)	155 (9.7%)	38 (2.4%)	85.1%
Louisiana	1,821	1,277 (70.1%)	227 (12.4%)	120 (6.5%)	89.1%
Maine	451	413 (91.5%)	18 (3.9%)	9 (1.9%)	97.5%
Maryland	2,557	2,178 (85.1%)	173 (6.7%)	67 (2.6%)	94.5%
Massachusetts	754	638 (84.6%)	46 (6.1%)	23 (3.0%)	93.7%
Michigan	3,606	3,089 (85.6%)	258 (7.1%)	107 (2.9%)	95.7%
Minnesota	662	388 (58.6%)	101 (15.2%)	48 (7.2%)	81.1%

Mississippi	821	615	(74.9%)	89	(10.8%)	37	(4.5%)	90.2%
Missouri	1,948	1,651	(84.7%)	127	(6.5%)	50	(2.5%)	93.8%
Montana	342	318	(92.9%)	14	(4.0%)	6	(1.7%)	98.8%
Nebraska	851	779	(91.5%)	46	(5.4%)	3	(0.3%)	97.2%
Nevada	205	183	(89.2%)	15	(7.3%)	2	(0.9%)	97.5%
New Hampshire	91	84	(92.3%)	4	(4.3%)	3	(3.2%)	100.0%
New Mexico	437	356	(81.4%)	41	(9.3%)	16	(3.6%)	94.5%
New York	4,371	3,034	(69.4%)	555	(12.6%)	326	(7.4%)	89.5%
North Carolina	2,648	1,993	(75.2%)	196	(7.4%)	114	(4.3%)	86.9%
North Dakota	141	132	(93.6%)	3	(2.1%)	2	(1.4%)	97.1%
Ohio	3,413	2,445	(71.6%)	587	(17.2%)	126	(3.7%)	92.5%
Oklahoma	1,659	1,490	(89.8%)	56	(3.3%)	38	(2.2%)	95.4%
Oregon	877	721	(82.2%)	102	(11.6%)	20	(2.2%)	96.1%
Pennsylvania	1,538	944	(59.6%)	249	(15.7%)	103	(6.5%)	81.8%
Rhode Island	113	97	(85.8%)	6	(5.3%)	4	(3.5%)	94.6%
South Carolina	969	734	(75.7%)	104	(10.7%)	44	(4.5%)	91.0%
South Dakota	382	346	(90.5%)	24	(6.2%)	3	(0.7%)	97.6%
Tennessee	1,288	990	(76.8%)	96	(7.4%)	52	(4.0%)	88.3%
Texas	5,503	4,718	(85.7%)	278	(5.0%)	160	(2.9%)	93.6%
Utah	303	240	(79.2%)	37	(12.2%)	9	(2.9%)	94.3%
Vermont	180	164	(91.1%)	10	(5.5%)	4	(2.2%)	98.8%
Virginia	1,751	1,221	(69.7%)	173	(9.8%)	97	(5.5%)	85.1%
Washington	784	686	(87.5%)	51	(6.5%)	17	(2.1%)	96.1%
West Virginia	508	331	(65.1%)	40	(7.8%)	30	(5.9%)	78.9%
Wisconsin	1,283	1,200	(93.5%)	40	(3.1%)	14	(1.0%)	97.7%
Wyoming	204	189	(92.6%)	7	(3.4%)	2	(0.9%)	97.0%

*Source: Federal Bureau of Prisons, *National Prisoner Statistics: Prisoners Released from State and Federal Institutions, 1964*, Table R5. Data for Alaska and New Jersey not included in source.

ment, the statutory potential, actually imposed in those instances in which it is warranted. Very few people would suggest that it is beneficial to impose long terms at random, for deterrent effect; the injustice of such a course is obvious. A penal code that authorizes a long term which is in fact imposed by the court where warranted is achieving the goal of deterrence so far as law and courts can achieve it. Accordingly, on the assumption that the highest potential sentence is

sufficient for deterrent effect, this consideration of sentencing is best served by carefully individualizing the offender being sentenced, making a disposition relative to his dangerousness and the requirements and limitations of rehabilitation.

Correspondingly, a sentence exceeding these requirements in punitiveness is a disservice to the entire penal system, needlessly increasing the population of the correctional institutions.

§ 10. THE SENTENCING HEARING

1 There shall be a hearing on the sentence, and the defendant
2 shall be given reasonable advance notice of it. At the hearing he shall
3 have the right to subpoena and present witnesses and to confront and
4 cross-examine those who have rendered reports to the court. At a
5 hearing to determine whether the defendant comes within subdivi-
6 sion 1 or 2 of section 5, hearsay evidence shall not be admissible
7 and, if contained in the presentence investigation or diagnostic
8 reports, shall be excluded from the judge's consideration. At the
9 conclusion of the hearing, the sentencing judge shall state in the
10 record the findings required by this Act.

11 In imposing sentence the judge shall pronounce it and shall
12 state the reasons for it.

13 A copy of the investigation report, together with the record on
14 the sentencing hearing, shall be sent to the institution or any other
15 agency or person that will supervise the defendant.

COMMENT ON SECTION 10

This section considerably expands the corresponding provisions in the first edition, which did not have a separate section on the hearing. For example, section 4 of the first edition contained a provision that granted the defendant being sentenced as a dangerous offender the right, subject to the control of the court, to cross-examine those who had rendered reports to the court. The present section gives this right to *all* defendants:

procedural due process should be applicable generally. The original thought was—and still is—that the sentencing of dangerous offenders may appropriately demand greater due process than is required in lesser sentences of nondangerous offenders. This distinction is still maintained in the section's first paragraph, which provides that hearsay evidence shall not be used against defendants coming within the dangerous offender category.

The last sentence of the first paragraph, requiring the judge to state his findings in the record, and the second paragraph, requiring him to state his reasons for the sentence imposed, also appeared in the first edition but in different sections. A rational, systematic approach to senten-

cing is supported by the requirement that the judge make a brief statement of the basic reasons for the sentence. A sentencing judge can, if he wishes, go further than the statute and give correctional authorities comments on the defendant as he has observed him.

§ 11. MODIFICATION OF SENTENCE

- 1 **The court, after a hearing at which the defendant is present and**
- 2 **of which the prosecutor has been notified, may reduce a sentence**
- 3 **within ninety days after it is imposed, stating the reason therefor for**
- 4 **incorporation in the record.**

COMMENT ON SECTION 11

This section is patterned after similar provisions existing in a number of states. It specifies a period within which the court may reduce the sentence in accord with mitigating material newly discovered by the court services or the institution. The federal Rules of Criminal Procedure authorizes modification within sixty days, which may be too short a time for jurisdictions in which judges travel a circuit; yet the period should not be so long as to conflict with institutional programs. Additional material discovered later can be used by parole boards.

The present section adds, to the corresponding section in the first edition, the requirement of a hearing at which the defendant is present and of which the prosecutor has been notified.

Review of Sentence

A few states authorize appellate courts to review sentences imposed

and, in their discretion, to reduce sentences they deem excessive or unequal. Although such statutes have been said to be supportive of increased rationality in sentencing,²⁹ they have not had a great impact on sentencing patterns, and the Model Act does not include any provision for appellate review of sentence similar to those now operative. Instead, more effective review is obtained by the careful delineation of the criteria for dangerous offenders, and under the Act the sentencing judge's findings upon these criteria would be subject to review.

Appellate review, intended mainly to guard against unduly long terms, is needed in existing sentencing systems. Compared with the Model Act's control of long terms, its achievement is limited.

29. See Sobeloff, *The Sentence of the Court—Should There Be Appellate Review?* 41 A.B.A.J. 13 (1955).

§ 12. WHO DETERMINES SENTENCE

1 All sentences under this Act shall be determined by the judge
2 of the court.

COMMENT ON SECTION 12

In about ten states the jury trying a criminal case determines not only the verdict but also, subject to instruction by the court, the sentence to be imposed if the verdict is guilty. The Model Act puts sentencing entirely in the hands of the judge.³⁰

We recommend that courts establish the following rule providing for sentencing councils or panels as first introduced in the U.S. District Court, Eastern District, Michigan, in 1960 and since adopted elsewhere:

The presentence investigation report shall be submitted to the sentencing judge and two other members of the court, who shall constitute a sentencing panel. The clerk shall provide the mem-

bers of the panel with statistical data regarding sentences imposed on other defendants for the crime of which the defendant to be sentenced has been convicted. After reviewing the report and the statistical data, the panel shall confer to arrive at the most desirable sentence for the defendant. The panel's recommendations shall be advisory only; the sentence shall be imposed solely by the sentencing judge.

Sentencing panels are feasible in all courts, not only in multi-judge courts. If there is only one judge in a locality, he can consult with other members of the panel through correspondence or the conference telephone.³¹

§ 13. PAROLE

1 Sections . . . relating to the powers of the parole board shall be
2 applicable to persons committed under this article.

COMMENT ON SECTION 13

The form of the sentence governs parole, and it is therefore appropriate to include, in a sentencing act, reference to the exercise of parole.

For parole to be effective the board of parole must have, among other things, ample authority to release at its discretion. Minimum terms of

parole eligibility infringe on this authority. Accordingly the Act does not provide for any minimum term (sections 5, 7, 8, and 9). If the parole law or other statute (penal code) in a jurisdiction states minimum terms, such provisions should be removed.

30. See Jouras, *On Modernizing Missouri's Criminal Punishment Procedure*, 20 U. KAN. CITY L. REV. 299 (1951-52); Kerr, *A Needed Reform in Criminal Law Procedure*, 6 KY. L.J. 107, 109 (1918); Note, *Consideration of Punishment by Juries*, 17 U. CHI. L. REV. 400 (1950); Note, *Determination of the Penalty—By Judge or Jury*, 1 TEXAS L. & LEG. 124 (1947); Note, *Should the Jury Fix the*

Punishment for Crime, 24 VA. L. REV. 426 (1938).

31. See letter by Judge James M. Burns, 14 CRIME & DELIN. 271-72 (1968), on the demonstrated feasibility of the panel device even in sparsely populated districts. On the operation of sentencing panels generally, see Hosner, *Group Procedures in Sentencing: A Decade of Practice*, 34 Fed. Prob., December 1970.

ARTICLE IV. MULTIPLE CHARGES

§ 14. MERGER OF SENTENCES

1 Unless the judge otherwise orders, (a) when a person serving a
2 term of commitment imposed by a court in this state is committed
3 for another offense, the shorter term or the shorter remaining term
4 shall be merged in the other term, and (b) when a person under
5 suspended sentence or on probation or parole for an offense com-
6 mitted in this state is sentenced for another offense, the period still to
7 be served on suspended sentence, probation, or parole shall be
8 merged in any new sentence.
9 Where authorized under the law of two jurisdictions: When a
10 person serving a term of commitment imposed by a court in another
11 state or jurisdiction is committed for another offense, the shorter
12 term or the shorter remaining term shall be merged in the other
13 term, and the commitment shall be served in the jurisdiction with the
14 longer remaining time to be served. When a person under suspended
15 sentence or on probation or parole for an offense committed in this
16 state is sentenced for another offense, the period still to be served on
17 suspended sentence, probation, or parole shall be merged in any new
18 sentence of commitment or probation.

**§ 15. TRANSMITTAL OF INFORMATION
OF MERGED SENTENCES**

1 The court merging the sentences shall forthwith furnish each of
2 the other courts and the penal institution in which the defendant is
3 confined under sentence with authenticated copies of its sentence,
4 which shall cite the sentences being merged.

§ 16. EFFECT OF MERGER OF SENTENCES

1 If an unexpired sentence is merged pursuant to section 14
2 of this Act, the courts which imposed the sentences shall modify them
3 in accordance with the effect of the merger.

§ 17. CONCURRENT OR CONSECUTIVE SERVICE OF TERMS

1 Separate sentences of commitment imposed on a defendant for
2 two or more crimes constituting a single criminal episode shall run
3 concurrently. Sentences for two or more crimes not constituting a
4 single criminal episode shall run concurrently unless the judge orders
5 otherwise.

COMMENT ON ARTICLE IV

A therapeutic penology is supported by a unified sentence rather than a multiplicity of sentences against a defendant who has committed more than one crime. A treatment plan is one that works toward the offender's return to the community for another start. But if the termination of one sentence serves only as the beginning of another, perhaps in another institution, no plan of treatment can be said to exist. So existing law favors concurrent rather than consecutive terms; and section 17 provides for concurrent terms in preference to consecutive terms, subject to judicial discretion. The words "not constituting a single criminal episode" are included so that the many indictments of more than one count will not lead to consecutive sentences where only a single criminal episode was involved.

Another aspect of the problem is dealt with by the Interstate Compact on Detainers and the model act for intrastate clearance of detainers, published by the Council of State Governments, which also worked at one time on a model act on merger of sentences. Section 14 of the Model Sentencing Act proposes such a plan; it provides for a merger of sentence, part of which has already been served when the offender is up for sentence again. The merger is discretionary,

not mandatory, although the language of the section suggests that in most instances it should occur. Massachusetts now has an analogous statute.³²

William L. Frederick, director of the Eastern office of the Council of State Governments, reviewed the article and commented as follows:

The growing adoption of the Agreement on Detainers, which now has been ratified by twenty-seven states, has some potential impact on interstate merger of sentences. The Agreement contains no provisions specifically relating to merger of sentence, but it is our impression that judges imposing sentences on persons already confined in other states sometimes do provide for merger.

Your draft would appear to assume enactment of the Agreement; without it, there is little possibility that a person serving a sentence in one state would be tried by a court in another state. Accordingly, it would seem to me desirable for the commentary to refer specifically to the Agreement on Detainers³³ and perhaps suggest that the enabling sections of the Agreement, but not the text of the Agreement, be modified to include the language you are recommending in your draft.

32. General Laws ch. 279, § 27.

33. See COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL ch. IV, Formal Arrangements for Clearing Detainers (1966).

ARTICLE V. REPEALS

§ 18. SECTIONS REPEALED, AMENDED

1 The following [chapters, sections] are hereby [repealed, amend-
2 ed]: . . .
3 Previously provided terms of commitment for felonies are
4 amended to conform to the terms specified in this Act. All other
5 acts and parts of acts inconsistent with the provisions of this Act
6 are hereby repealed.

COMMENT ON SECTION 18

The first sentence of the second paragraph did not appear in the first edition of the Model Sentencing Act; without it, the repeals section left open the possibility that the great variety of sentencing provisions existing in codes generally would survive. It is now added to make clear that terms of commitment provided for in the MSA shall apply to all offenses.

A commission or other body revising a penal code would be expected to re-examine all of it with a view toward abolishing "crimes without victims," reclassifying crimes that are now misdemeanors but should be felonies and vice versa, and establishing classifications based on those recommended in the MSA or other models. In the absence of such a review, it is feasible to achieve a short-cut classification by which maximum terms would be thirty years for dangerous offenders, life for murder in the first degree, an optional ten-year term for atrocious crime, and five years for other crimes.

Specific repeals should include the sections governing sentencing of repeated or habitual offenders and "sexual psychopath" acts (since a more precise test of dangerous offenders is included in section 5), sections

dealing with concurrent and consecutive sentences (the subject of such sections being dealt with in Article IV), and the sections dealing with minimum or maximum terms of commitment. Good-time allowance laws should be amended to be inapplicable to defendants committed under section 5.

The Model Sentencing Act operates under the distinction between felony and misdemeanor but does not define them. The classification in any jurisdiction adopting the Act would govern. However, in view of the potential reduction of terms under the Model Act, including the possibility of commitment to a local institution for a term of less than one year (section 9), the jurisdiction's definition of felony and misdemeanor should be examined. The grade of offense in a particular jurisdiction may be governed by the penalty for it. Since the Model Act repeal section would repeal these provisions, it may be necessary, in such a jurisdiction, to substitute a declaration that certain specified crimes are felonies.

In a jurisdiction with jury sentencing, the sections so providing should be amended or repealed to conform to section 12.

Council of Judges

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CHARLES O. BETTS, Judge, Ninety-eighth District Court, Austin, Tex.

LEO B. BLESSING, Judge, Juvenile Court, Parish of Orleans, New Orleans, La.

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BYRON B. CONWAY, Judge, County Court of Wood County, Wisconsin Rapids, Wis.

IRVING BEN COOPER, Judge, United States District Court, New York, N.Y.

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PHILIP E. LAMBERT, Chief Judge, Oklahoma City Municipal Court, Oklahoma City, Okla.

BENJAMIN LANDIS, Judge, Superior Court, Los Angeles, Calif.

JOHN E. MULLEN, Presiding Justice, Superior Court of Rhode Island, Providence, R.I.

TIM MURPHY, Judge, Superior Court of the District of Columbia, Washington, D.C.

ALFRED P. MURRAH, Director, Federal Judicial Center, Washington, D.C.

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JAMES C. OTIS, Associate Justice, Supreme Court, St. Paul, Minn.

CLAUDE M. OWENS, Judge, Superior Court of Orange County, Santa Ana, Calif.

CLINTON BUDD PALMER, Judge, Third Judicial District Court, Easton, Pa.

GEORGE H. REVELLE, Judge, Superior Court, Seattle, Wash.

HENRY A. RIEDERER, Judge, Circuit Court, Division No. 1, Kansas City, Mo.

LEWIS F. RUSSELL, Judge, Juvenile Court of Dallas County, Dallas, Tex.

JOE W. SANDERS, Associate Justice, Supreme Court of Louisiana, New Orleans, La.

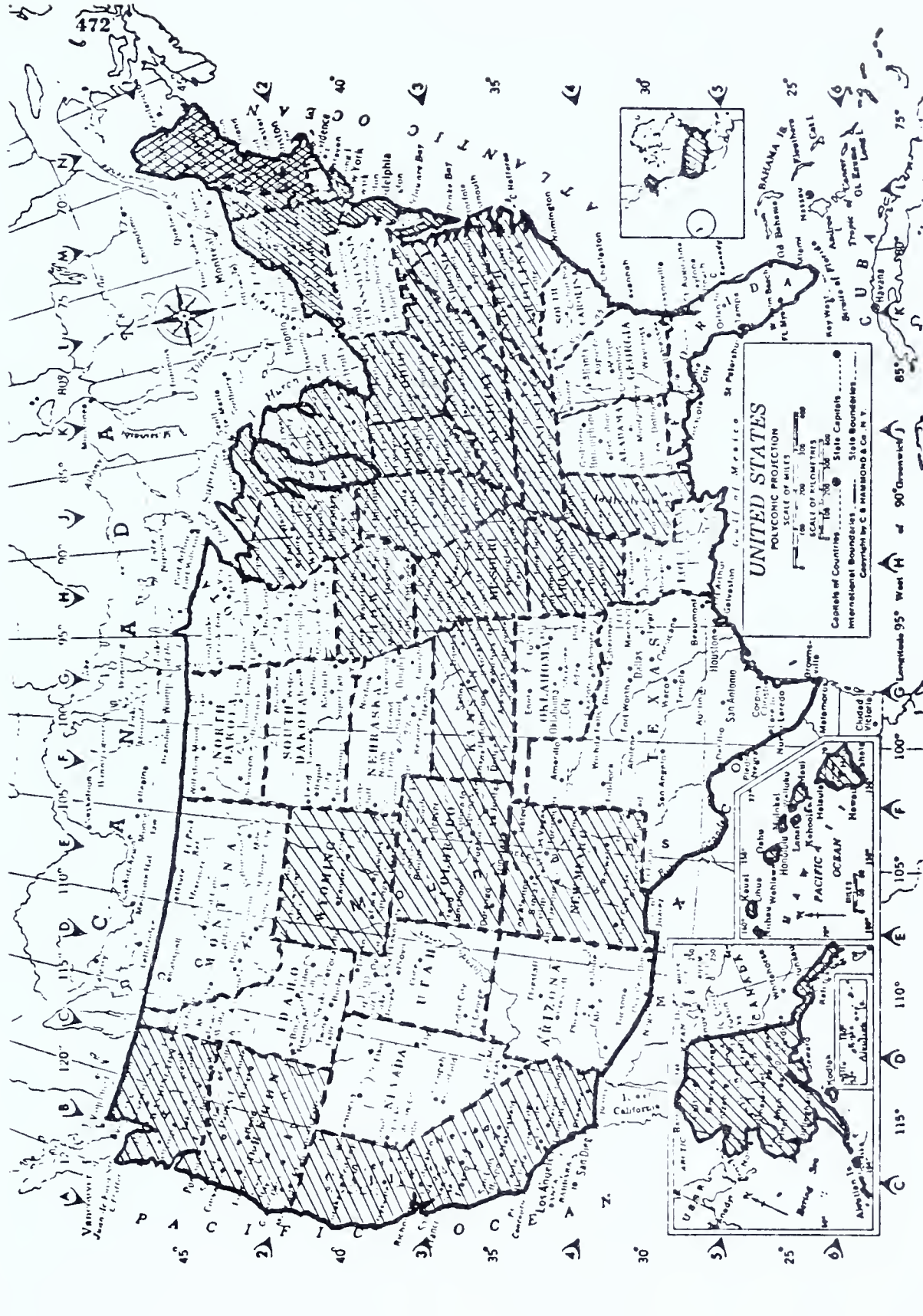
HERBERT J. STEFFES, Senior Judge, Criminal Court Branches, Circuit Court, Milwaukee, Wis.

G. JOSEPH TAURO, Chief Justice, Commonwealth of Massachusetts, Supreme Judicial Court, Boston, Mass.

CURTIS V. TILLMAN, Judge, Juvenile Court of DeKalb County, Decatur, Ga.

Staff
SOL RUBIN, Counsel

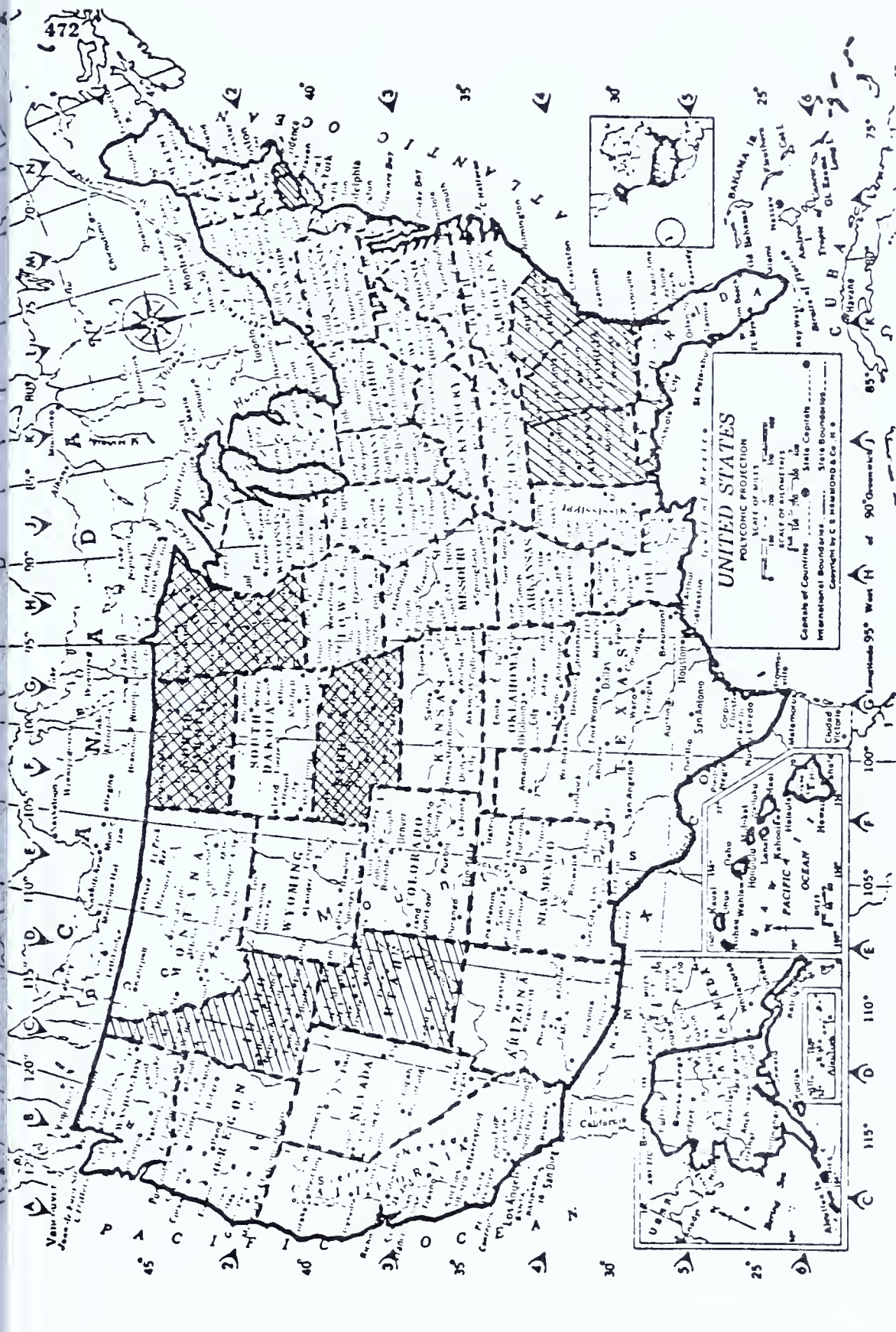
APPENDIX J



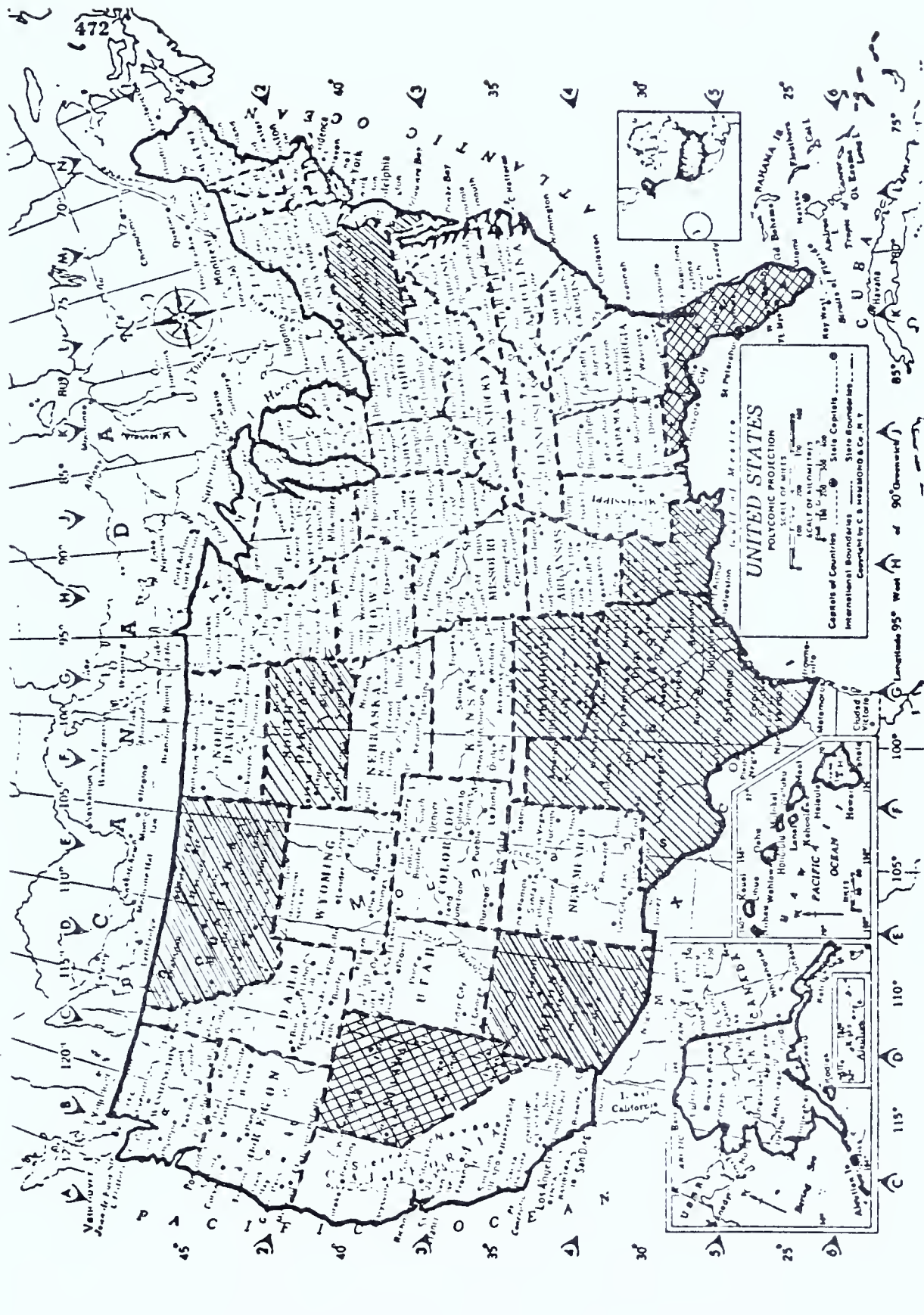
POWER VESTED IN GOVERNOR ALONE (27)

POWER VESTED IN GOVERNOR WITH ADVICE AND CONSENT OF EXECUTIVE COUNCIL OR SENATE (R.I. ONLY) (4)

Note 1: In California, the Governor may not pardon second offenders except with consent of supreme court.



Note 2: In Alabama and South Carolina, the Governor has the power to commute the death penalty.



GOVERNOR HAS VETO OVER FAVORABLE RECOMMENDATIONS BY BOARD (10)

GOVERNOR A MEMBER OF THE BOARD (2)

APPENDIX K

APPENDIX K

SUMMARY OF RESPONSES TO NCCD PARDONS QUESTIONNAIRE COMPILATION	K-1
SUMMARY OF RESPONSES TO NCCD PARDONS QUESTIONNAIRE INDIVIDUAL STATE RESPONSES	K-3

APPENDIX K

SUMMARY OF RESPONSES TO NCCD PARDONS QUESTIONNAIRE

1. Who has final pardon authority in your state?

<u>44</u>	Governor
<u>11</u>	Board of Pardons (and Parole)
<u>0</u>	Other (specify)

2. Is there a board of pardons?

<u>42</u>	Yes
<u>13</u>	No

If above is answered "yes":

A. Is it an independent agency or part of a parole board?

<u>12</u>	Independent
<u>29</u>	Part of parole board
<u>1</u>	Other (specify)

B. Number of board members
(See state-by-state summary, p. K-3.)

C. Appointment by:

<u>6</u>	Governor
<u>15</u>	Governor with consent of Senate
<u>15</u>	Other
<u>6</u>	Information not available

NOTE: The NCCD Pardons Questionnaire Survey included the fifty states, American Samoa, Guam, Puerto Rico, the Virgin Islands and Washington, D.C.

D. Qualitifications for appointment:

<u>6</u>	Attorney	<u>1</u>	Sociologist	<u>4</u>	Supreme Court Justice
<u>1</u>	M.D.	<u>3</u>	Lt. Governor	<u>5</u>	Qualified Electors
<u>2</u>	Psychiatrist	<u>5</u>	Governor	<u>19</u>	Other
<u>2</u>	Psychologist	<u>6</u>	Atty. General	<u>9</u>	None

E. Is membership a 12 full-time 23 part-time position?
7 Information not available

F. What is the membership compensation

Full-Time:

<u>12</u>	Salary (amount)
<u>3</u>	Per Diem (amount)
<u>5</u>	Travel (amount)
<u>0</u>	None
<u>2</u>	Other (describe)

Part-Time:

<u>7</u>	Salary (amount)
<u>11</u>	Per Diem (amount)
<u>12</u>	Travel (amount)
<u>5</u>	None
<u>6</u>	Other (describe)

3. What are the powers of the board of pardons? (If not independent, the powers of the board of pardons and parole which relate specifically to pardons.)

<u>9</u>	Commute death sentence to life imprisonment
<u>12</u>	Commute minimum sentence to lesser minimum sentence
<u>12</u>	Commute maximum sentence to lesser maximum sentence
<u>9</u>	Remission of fines
<u>35*</u>	Other (specify)

*Included in "Other" are those boards whose duties are advisory only; recommendations made by such boards may pertain to the aforelisted concerns.

4. What procedures are followed:

	<u>Yes</u>	<u>No</u>	<u>Discretionary/ Conditional</u>	<u>Information not available or no applicable</u>
A. Is there a hearing?	<u>32</u>	<u>7</u>	<u>3</u>	<u>0</u>
B. Is the petitioner present?	<u>17</u>	<u>9</u>	<u>15</u>	<u>1</u>
C. Is counsel permitted?	<u>31</u>	<u>6</u>	<u>2</u>	<u>3</u>
D. Is counsel required?	<u>0</u>	<u>34</u>	<u>6</u>	<u>2</u>

5. What is the average number of petitions filed each year?
What is the average number of those granted?

(See state-by-state summary, p. K-5.)

SUMMARY OF RESPONSES TO NCCD PARDONS QUESTIONNAIRE

INDIVIDUAL STATE RESPONSES

	<u>QUES. #1</u>	<u>QUES. #2</u>	<u>QUES. #2A</u>	<u>QUES. #2B</u>	<u>QUES. #2C</u>	<u>QUES. #2D</u>	<u>QUES. #2E</u>
ALABAMA	B	A	2	3	2	11	1
ALASKA	A	B	-	-	-	-	-
ARIZONA	A	A	2	3	2	11	1
ARKANSAS	A	A	1	5	2	10	2
CALIFORNIA	A	A	2	8	2	11	1
COLORADO	A	A	1	12	1	12	2
CONNECTICUT	B	A	1	5	2	1,9,11	2
DELAWARE	A	A	1	5	3	6,10,11	2
FLORIDA	B	A	1	7	3	7,11	2
GEORGIA	B	A	2	3	2	12	1
HAWAII	A	A	2	5	2	12	2
IDAHO	B	A	2	5	3	11	2
ILLINOIS	A	A	2	10	2	11	1
INDIANA	A	A	2	5	1	11	1
IOWA	A	A	2	3	1	1,10	2
KANSAS	A	A	2	3	2	12	2
KENTUCKY	A	A	2	-	-	-	-
LOUISIANA	A	A	1	3	2	6,8,11	2
MAINE	A	A	2	-	-	-	-
MARYLAND	A	A	2	-	-	-	-
MASSACHUSETTS	A	A	2	7	3	1,3, 4,5,11	1
MICHIGAN	A	A	2	5	3	-	1
MINNESOTA	B	A	1	3	3	7,8,9	2
MISSISSIPPI	A	B	-	-	-	-	-
MISSOURI	A	B	-	-	-	-	-

	<u>QUES. #1</u>	<u>QUES. #2</u>	<u>QUES. #2A</u>	<u>QUES. #2B</u>	<u>QUES. #2C</u>	<u>QUES. #2D</u>	<u>QUES. #2E</u>
MONTANA	A	A	1	3	2	12	2
NEBRASKA	B	A	1	3	3	7,8,11	2
NEVADA	B	A	1	7	3	7,8,9	2
NEW HAMPSHIRE	A	A	2	-	3	12	-
NEW JERSEY	A	A	2	-	-	-	-
NEW MEXICO	A	A	2	5	1	12	2
NEW YORK	A	B	-	-	-	-	-
NORTH CAROLINA	A	A	2	-	-	-	-
NORTH DAKOTA	B	A	1	5	3	7,8,9,11	2
OHIO	A	A	2	7	3	1,11	1
OKLAHOMA	A	A	2	5	3	11	2
OREGON	A	B	-	-	-	-	-
PENNSYLVANIA	A	A	1	5	2	1,2,3,4, 6,8,11	2
RHODE ISLAND	A	B	-	-	-	-	-
SOUTH CAROLINA	B	A	2	6	2	12	2
SOUTH DAKOTA	A	A	2	3	3	10	2
TENNESSEE	A	A	2	3	1	11	1
TEXAS	A	A	2	3	3	11	1
UTAH	B	A	2	3	3	10	2
VERMONT	A	A	2	3	2	11	2
VIRGINIA	A	B	-	-	-	-	-
WASHINGTON	A	A	2	-	-	-	-
WEST VIRGINIA	A	B	-	-	-	-	-
WISCONSIN	A	B	-	-	-	-	-
WYOMING	A	B	-	-	-	-	-
AMERICAN SAMOA	A	B	-	-	-	-	-
GUAM	A	A	3	3	1	12	2
PUERTO RICO	A	A	2	3	2	1,12	1
VIRGIN ISLANDS	A	B	-	-	-	-	-
WASHINGTON D.C.	A Pres.	B	-	-	-	-	-

	<u>QUES. 2F</u>	<u>QUES. 3</u>	<u>QUES. 4</u>		<u>QUES. 5</u>
			A-1 C-1		180
ALABAMA	FT-1	D	*B-1 D-2		174
					50
ALASKA	-	-	-		25
			A-1 C-1		
ARIZONA	FT-1	E	B-1 D-		-
			A-1 C-1		- (1971-
ARKANSAS	PT-2	E	B-1 D-2		113 1972)
			A-1 C-2		100
CALIFORNIA	FT-1,2,3	E	B-2 D-2		25
			A-1 C-2		15
COLORADO	PT-3	E	B-2 D-2		12
			A-1 C-1		280
CONNECTICUT	PT-2	A,B,C,E	B-1 D-2		28
			A-1 C-1		30
DELAWARE	PT-1,4	B,C,E	B-1 D-2		-
			A-1 C-1		897 (actual)
FLORIDA	PT-4	A,B,C,D,E	*B-1 D-2		847 (1972)
			A-2 C-1		23
GEORGIA	FT-2,3	A,B,C,D,E,	B-2 D-2		33
			A-2 C-		
HAWAII	PT-3	E	B-2 D-		-
			A-1 C-1		750 (1972
IDAHO	PT-1,2,3	B,C,D,E	B-1 D-2		250 fig.)
			A-1 C-1		200
ILLINOIS	FT-1,2,3	E	*B-1 D-2		5-8%
			A-1 C-1		50
INDIANA	FT-1	E	*B-1 D-		4
			A-2 C-1		60
IOWA	FT-1,5	E	B-2 D-2		15-20
			A-1 C-1		500
KANSAS	PT-1,2,3	E	*B-1 D-2		5% or less
			*A-1 C-1		100
KENTUCKY	-	E	B- D-2		3
			A-1 C-1		1006 (1972
LOUISIANA	PT-4	E	*B-1 D-2		301 fig.)
			A-1 C-1		121
MAINE	-	B,C,D,E,	*B-1 D-2		49
			*A *C		70
MARYLAND	-	E	*B *D		50
			A-1 C-1		1000-1200
MASSACHUSETTS	FT-1,3	A,B,C,E	B-1 D-2		300-400
			A-1 C-1		10-15
MICHIGAN	FT-1	E	B-1 D-2		2-5
			A-1 C-1		
MINNESOTA	PT-2,3,5	C,E	B-1 D-		-
					40
MISSISSIPPI	-	-	-		None
MISSOURI	-	-	-		-

*discretionary, conditional or variable
- information not available or not applicable

	QUES. 2F	QUES. 3	QUES. 4	QUES. 5
MONTANA	PT-1,2,3	E	A-1 C-1 B-1 D-2	-
NEBRASKA	PT-5	A,B,C,D,E	A-1 C-1 *B-1 D-2	30 23
NEVADA	PT-4	A,B,C,D	A-1 C-1 *B-1 D-2	30 40%
NEW HAMPSHIRE	-	-	A-1	-
NEW JERSEY	-	E	A-2	148 67
NEW MEXICO	PT-2,3	E	A-1 C-2 B-2 D-2	75 50%
NEW YORK	-	-	-	-
NORTH CAROLINA	-	E	A-1 C-1 *B-1 D-2	25-50 50%-60%
NORTH DAKOTA	PT-2,3,5	A,B,C,D,E	A-1 C-1 B-1 D-2	50 5
OHIO	FT-1,3	E	A-1 C-1 B-1 D-2	37 14
OKLAHOMA	PT-1,2,3	-	A-1 C-1 B-1 D-2	1200 65%
OREGON	-	-	-	60 10
PENNSYLVANIA	PT-1,5	E	A-1 C-1 *B-1 D-2	430 130
RHODE ISLAND	-	-	-	1 None
SOUTH CAROLINA	PT-5	B	A-1 C-1 B-1 D-2	1400 560
SOUTH DAKOTA	PT-1,3	A,B,C,D	A-1 C-1 B-1 D-2	-
TENNESSEE	FT-1,3,5	E	A-1 C-1 B-1 D-2	-
TEXAS	FT-1	E	A-1 C-1 B-1 D-2	225 200
UTAH	PT-2,3	A,D	A-1 C-1 B-1 D-2	10 3
VERMONT	PT-2,3	E	*A *C *B *D	-
VIRGINIA	-	-	-	500 25
WASHINGTON	-	E	A-2 C-2 B-2 D-2	50 0
WEST VIRGINIA	-	-	-	-
WISCONSIN	-	-	-	298 74
WYOMING	-	-	-	-
AMERICAN SAMOA	-	-	-	-
GUAM	PT-4	E	A-2 C-2 B-2 D-2	6 5
PUERTO RICO	FT-1	E	A-2 C-2 B-2 D-2	107 (average, 54 (1967-71)
VIRGIN ISLANDS	-	-	-	-
WASHINGTON, D.C.	-	-	-	576 650 (average, 106 (1967-71)

